TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 207.

HIRAM BARNEY, COLLECTOR OF THE PORT OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

WILLIAM WATSON AND WILLIAM G. TOWNLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 18, 1874.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Hiram Barney, plaintiff in error, and William Watson and William G. Townley, defendants in error, a manifest error hath happened, to the great damage of the said Hiram Barney, as is said, and as appears by complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October, 1874, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 9th day of June, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
June 9, 1874.

SAM. BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to 110, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Hiram Barney, plaintiff in error, and William Watson and William G. Townley, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of July, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

Filed June 10, 1874.

3 Circuit court of the United States for the southern district of New York, in the second circuit.

Pleas before the circuit court of the United States for the southern district of New York, in the second circuit, of the term of October, in the year of our Lord 1864.

Witness, honorable David A. Smalley, judge; Kenneth G. White, clerk.

CITY AND COUNTY OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, in October term, now here, before a justice of the circuit court of the United States for the southern district of New York, at the court-house in the city of New York, came William Watson and William G. Townley, by Martin &
4 Smith, their attorneys, and into said court, before the justice thereof, then and there, according to the statute in such case made and provided, their certain declaration against Hiram Barney, of the plea of trespass on the case upon promises, which said declaration is in these words, that is to say:

"SOUTHERN DISTRICT OF NEW YORK,
"*City and County of New York, ss:*

"William Watson and William G. Townley, plaintiffs in this suit, by Martin & Smith, their attorneys, complain of Hiram Barney, defendant in this suit, being in custody, &c., of a plea of trespass on the case on promises:

"For that whereas, at the several times hereinafter mentioned, the said plaintiff' were partners in trade under the name, style, and firm of William Watson & Co., and the said defendant was collector of the port of New York.

5 "For that whereas the said defendant, collector as aforesaid, on the 24th day of March, 1864, at the city and county of New York aforesaid, was indebted to the said plaintiff in the sum of three thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendants should be thereunto afterwards requested.

6 "And whereas, also, the said defendant, collector as aforesaid, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of three thousand dollars, lawful money as aforesaid, for so much money before that time paid, laid out, and expended by the said plaintiffs to and for the use of the said defendant, and at the like special instance and request of the said defendant, and being so indebted, the said defendant, collector as aforesaid, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

7 "And whereas, also, the said defendant, collector as aforesaid, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of three thousand dollars, like lawful money as aforesaid, for money before that time had and received by the said plaintiffs, and being so indebted, said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, under-

took and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned when the said defendant shall be thereunto afterwards requested.

"And whereas, also, the said defendant, collector as aforesaid,
8 afterwards, to wit, on the same day and *and* year last aforesaid, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of three thousand dollars, like lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money
9 last above mentioned, when the said defendant should be thereunto afterwards requested.

"Nevertheless, the said defendant has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of three thousand dollars, and thereupon they bring suit.

"And the said plaintiffs show to the court that this action was commenced in the court of common pleas for the city and county of New York, by the service of a summons on the defendant personally, on the second day of April, 1864, within the southern district of the State of New York, and the said defendant duly appeared in the said
10 action, and whereupon certain proceedings were had in pursuance of the statute in such case made and provided, whereby the clerk of this court did issue a writ of certio'ari to the said court of common pleas to send to this court the record and proceedings in this cause; whereupon the said record and proceedings were sent to this court by the said court of common pleas.

"MARTIN & SMITH,
Plaintiffs' Attorneys."

And the said Hiram Barney, the defendant in this suit, by E. Delafield Smith, esq., his attorney, comes and defends and brings into the said court his plea; which said plea is in these words, that is to say:

"And the said defendant, Hiram Barney, by E. Delafield Smith, his attorney, comes and defends the wrong and injury, when, &c., and
11 says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

(Signed) "E. DELAFIELD SMITH,
"*Defendant's Attorney.*

"To MARTIN & SMITH, Esqrs.,
"*Plaintiffs' Attorneys.*"

Therefore the issues above joined are ordered by this court to be tried on the first Monday of April, 1873.

Afterwards, that is to say, on the day and at the place last above mentioned, namely, on the ninth day of June, 1873, before honorable

Smalley, holding the circuit court of the United States for the southern district of New York, according to the form of the statute in such case made and provided, came as well the above-named plaintiffs as the above-named defendant, by their respective attorneys, above
12 mentioned, and the jurors of the jury examined to try the said issue being called, also came, who, to speak the truth of the matters aforesaid being chosen, tried, and sworn, say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiffs above complained against him, and they assess the damages of the said plaintiffs by reason of the premises, over and above their costs and charges by them about their suit in this behalf expended, to two thousand two hundred and thirty-five dollars and twenty-two cents in gold, and for these costs and charges to six cents. Therefore it is considered that the said plaintiffs do recover against the said defendant their said damages, costs, and charges by the jurors in form aforesaid assessed, and also one hundred and eight dollars and eighty-five cents in currency for their said costs and charges by the said court now here [adjudged of increase of the said plaintiffs and with their assent.

13 Gold, $2,235.72.
Currency, 108.85.

And the said defendant in mercy, &c.

Judgment signed this 27th June, 1873.
(Signed) R. E. STILWELL,
Dep'y Clerk.

(Endorsed:) U. S. circuit court. William Watson et al. agst. Hiram Barney. Martin & Smith, attys. for plff. Filed June 27, '73.

14 United States circuit court, southern district of New York.

WILLIAM WATSON ET OTHERS
vs.
HIRAM BARNEY.
} Bill of exceptions.

This cause coming on to be tried before Hon. D. A. Smalley, judge, &c., and a jury, &c.,

HENRY S. SPAULDING, sworn for plaintiff, examined by Mr. Smith:

I am in the dry goods commission business; 30-odd years in New York. I have dealt in such articles as Exhibits A & B, being samples of the goods hereinafter mentioned; do not at present. I have seen the article.

Q. Will you look at them and tell me what they are known as in the trade?

15 A. The two samples, A & B, are twilled flannel.

Q. What is that article annexed (Exhibit C) to deposition of witness Freeman, hereinafter referred to?

A. That is an article made of worsted—a kind of serge or rattine.

Q. Do you know the difference between wool and worsted?

A. I do.

Q. What is the difference?

(Objected to until it is shown that he is competent; that is a question for an expert.)

A. I know all about wool and all about worsted. If I don't know that, I don't know anything.

Q. (By the Court.) Have you been dealing in these articles?

A. Yes, sir; been buying and selling domestic and foreign goods for more than 30 years.

Q. What is the difference between wool and worsted?

(Objection overruled; exception by defendant.)

A. The difference between wool and worsted is this: Worsted
16 is made of a long kind of wool. The process is to run it through a combing-machine, and wool is done through a carding-machine. The worted is combed, and the wool is carded; and in the making of worsted they use a long staple wool, and for the making of woolen they use the short staple of various kinds. Exhibit C is made of worsted, or worsted and cotton; I don't know; it is worsted fabric.

Q. What is done with that?

A. That is combed.

Q. And what in respect to these two specimens or samples A & B; is that carded or combed?

A. Carded; it could not be combed.

A. Why?

A. It is not long-fibre wool, and it is the very poorest kind of wool.

Q. Is there any difference as regards date between your answers now and 1861 and 1862, whether that is flannel or not?

17 A. It has always been known as a twilled flannel.

Cross-examined:

Have dealt in the article such as Exhibit A since 1835. It is used generally for shirts, and sometimes for lining. It is usually made in this country, and also in the neighborhood of Huddersfield and Battersby, England. It always has been an article of importation since I have been in the trade.

Q. Where was it first made in this country?

A. Since I have known anything about woolen goods I have seen it in the process of manufacture—in the loom in New England and Massachusetts; I think at Woomsocket, R. I. I don't know that I have seen it in Massachusetts.

Q. Where else have you seen it, except in these mills?

A. I don't know as I have seen it manufactured, but I have been dealing in it all my life.

18 Q. Have you ever watched it through the process of its manufacture?

A. I can't say that I did. My business at the present time is domestic commisssion business, selling woolen goods on account of manufacturers. I have been in manufactories so many times in fact that I think I know what I am talking about.

Q. Prior to 1864?

A. Yes; and prior to '44.

Q. Explain the materials of which this is composed.

A. This flannel is composed of the very poorest kind of wool and cotton crowded together. I will show it to you—partly of what we cal lin the trade "shoddy"—made of cotton and a little pure wool with it.

Q. Which way does the cotton run? Is it a cotton-warp entirely?

A. I think it is carded cotton and wool, both warp and filling. That is what I judge.

Q. When you say it is carded together, what do you mean?

19 A. I mean that the wool and cotton is mixed and run through the cards together so as to make it amalgamate. After the wool is carded it is spun. It is made into roping, and that rope is spun into threads, and they are warped on the loom.

Q. I want to know if there is any cotton in the threads, or if the cotton is separated there.

A. I have not analyzed that sufficiently to tell whether there is any threads in the cotton. The proper designation is domet flannel, which is a mixture of cotton and wool.

Q. Is there any worsted in there?

A. Not that I see; cotton and wool both ways.

Q. Did you ever see worsted made?

A. Yes, sir; I have. The difference between them is that worsted is run upon a combing-machine which has a circular machine with little needles or teeth, and the wool is drawn, according to the method which has been in existence for the last 10 or 15 years, through this
20 circular machine, which pulls and lengthens the fibre sometimes 2 feet and sometimes ½. That is the method of preparing worsted for spinning or for combing or any purpose that makes worsted threads. The wool is made on a set of cards. I think there are 4 or 5 of what they call breakers, and it goes from the one that takes it in the first place, and it passes from there to another, another, and another, so as that it is in a condition fit to spin; and there is a very great variety in quality of wool that is carded. There is not a great variety of worsted that is carded.

Q. What is a flannel?

A. It is an article made of wool, or wool and cotton, and an article that is not fulled like cloth. It doesn't go through a fulling-machine to make it a cloth by fulling. I mean beaten up so that it is
21 solid and firm so that it will partake of a finish like your coat. The flannel is not fulled.

Q. So that your definition of flannel is a light fabric of wool, or wool and cotton not fulled.

A. It might be of light or heavy. There are various weights to flannel, but it is open—a sleazy fabric in comparison to such goods as are worn for exterior fabrics. These goods cannot be worn until they are beaten together, but flannel, generally, is not that. Sometimes it is a little fulled, generally not much, and sometimes not at all.

Q. What is the difference between a poor woolen and a flannel? When does a flannel cease to be a flannel and become a piece of poor woolen?

A. It ceases to be a flannel when it is so much fulled that it has not got that easy, sleazy kind of look which all flannels have.

Q. How do you distinguish it?

A. The same as I distinguish you from Mr. Smith—by the appearance.

22 Q. Are you able to tell when a flannel ceases to be a flannel and becomes a piece of cloth?

A. The distinction is about the same as when a tadpole ceases to be a tadpole and becomes a frog. It is very hard to describe. When goods pass from flannel to woolen goods or some other name or description, it gets so by a fulling process, when it is beaten together and becomes a heavier, firmer article. That gradation will run sometimes to a very nice distinction. Take goods that are made in this country, flannel that gentlemen wear for coats, made by the Washington Mills, it is so much finer than an ordinary flannel that if you place it alongside, it is impossible, almost, to distinguish the difference between that and cloth.

Q. So that you want us to understand that in order to distinguish when a flannel ceases to be a flannel and to be a piece of woolen cloth,

for instance, that their characteristic mark or distinction is that
23 one is fulled more than the other?

A. Yes, that is the general characteristic distinction.

Q. Is that the only distinction or characteristic?

A. No, I don't know that it is.

Q. What other one is there?

A. I don't know how to answer you. You ask me to describe something that you have never seen, but if you knew it as well as I do you could tell it by feeling it in your hand. I tell it by its appearance.

Q. Can you give me any other characteristic between what is a flannel and what is not a flannel in the line of woolen cloth?

A. I don't think there is much other distinction than in the fulling and that is irrespective of quality. And that is irrespective of whether it is twilled or not; it may be twilled or plain either. I never knew a flannel to be made of worsted.

Q. What is the difference between a piece of merino and flannel?

24 A. A piece of merino has generally the twill thrown in a different way from what the twill on a flannel is. Indeed the twill on a merino is entirely different. I can't tell you the difference except if you show me a piece of merino I can tell you. The twill is thrown in an entirely different way, but the flannel is generally made of a kersey twill. That is not the only difference. Merino proper is generally made of a class of wool called merino wool, and it goes through the process of combing and treating the cards a little different from what wool does.

Q. After it is made what is the characteristic difference between what you call a merino and what you call a flannel?

A. A difference of appearance and difference of treatment in the manufacture. In its appearance. The difference is that the twill
25 is thrown differently, which makes it as much different as there is between your doeskin pants and my pants.

Q. Is there any other difference between a merino and flannel except in the twill and appearance?

A. Merino is generally made of a very superior class of what is called wool for merinos, made of an entirely different class of wool, and it is made sometimes with cotton in it. Merino is never made of worsted. A merino may be cotton warp, and a flannel may be cotton warp, or may be cotton either way or may be silk warp.

Q. For what purpose is flannel used?

A. Generally for shirts.

Q. What other general purposes?

A. They use it for baby's pet'icoats and ladies' pet'icoats.

Q. And what other general purpose?

A. I think that is the general purpose of it. Ladies' dresses are sometimes made for winter wear out of fine flannel, and gentlemen wear it for coats. You go to Saratoga and you will find gentlemen wearing coats there worth $40.00.

26 Q. What do you mean by short staple?

A. I mean wool of a shorter fibre in length, and just the same as you will meet one man with long hair and another with short hair, some sheep have long fibre to the wool, and others have short. Exhibit A is not combed, but carded.

Q. Tell me by looking at that how you tell whether it is combed or carded.

A. I don't know how anybody that knows anything about dry goods

can fail to tell. I can't answer your question in any better way than that. I don't believe you can find one dry goods man in the city of New York that will tell you that that is anything but flannel. I have no interest in the matter at all.

Q. What is this Exhibit C?

A. It is a piece of white worsted, serge or rattine as it is called in the trade.

(The district attorney produces some samples and marking two
27 thereof fastened together as Exhibit 1, shows it to witness.)

Q. (Ex. 1 shown.) What is that or what are those?

A. Both flannel.

Q. By what other name are they known?

A. I don't know them by any other name.

Q. What is shoddy?

A. It is the refuse of the carding off or shearing of wool, and it is old woolen rags and goods picked to pieces and recombed. It is mixed with pure wool for manufacture.

Q. And into what articles is it manufactured?

A. Into almost all kinds of woolen goods; a greater or less proportion of it is mixed with fine goods that you think has not been worn by somebody else, and it is made into flannel, also into a poor kind of cloth.

Q. What kind of flannel would you call this?

28 A. I should call it a light gray.

Q. Are there any lower grades of flannel?

A. I never saw any.

Q. Did you ever see a piece of woolen cloth poorer than that?

A. I never saw a piece of woolen cloth that was like that.

Q. Did you ever see a piece of woolen goods poorer than that?

A. Yes, many.

Q. For what purpose are they used?

A. Generally for negro shirts and miner suits; people that can't afford to buy better goods.

Q. How many kinds of woolen cloth poorer than this are there to your knowledge, or were there in 1861, in the market; I mean woolen goods?

A. A good many that are poorer than that.

Q. For what purpose are they used?

A. Similar purposes.

Q. And in 1864 what was the value of this per square yard?

A. I don't know. I should not suppose it would cost over 6
29 pence sterling, or 7 pence. I have not imported goods in so long.

Q. I mean in the market on this side.

A. I did not deal in this at that time.

Q. I understood you to say that you had dealt in that for thirty years.

A. I have known them for 30 years and dealt in them for many years.

Q. Since when have you dealt in them?

A. Since previous to 1860.

Q. We will take the market as it was in 1864, for instance; about what was this worth a yard at that time?

A. I can't tell you so closely as to be positive exactly. I should not suppose it was worth more than ¼ dollar a yard in '64.

Q. What was the lowest price of any piece of woolen goods per yard of a poorer quality than that—any kind of woolen goods?

A. I have seen flannel of this kind poorer. I recollect a very large lot that was sold for 17 cents in 1862. The only grades that I
30 know of woolen articles of this character in 1864 of a lower grade than this to the best of my recollection ran about 15c. to 17c. a yard.

Q. And this you think was worth what at that time?

A. I should not think it was worth more than ¼ of a dollar—the current market price of goods at that time my attention was not called to.

Q. How wide did this come to the market?

A. I suppose 25 to 27 inches; that is the usual width about.

Q. Was it folded?

A. I have seen them twice that width, and I have seen them also 25 or 27.

Q. You say they come both ways?

A. Flannels are made of double-width and single-width.

Q. How did this come to the market?

A. I don't know; I never saw it before to-day. They generally come in what we call ¾ width. They are rolled or folded. Flannels come to the market in the same way, either in folds about this [indicating]
31 width. If they are double that width they are folded in the middle. That is merely a matter of fancy, just as a manufacturer sees fit.

Q. And do both classes of goods come in both ways?

A. They do; almost all classes of flannel; many flannels are what we call double width. Generally flannel is single width, and it is sometimes a yard wide.

Q. And these you think come folded too?

A. I don't know; they come put up like other flannels, as a general thing.

Q. Did you ever see an article like that in the American market since 1864 or since 1861 come to the market folded?

A. I haven't any general knowledge of observing those goods in this condition since that time.

Juror:

32 Q. When it comes from the looms as finished it is flannel, and when it goes to the fuller's and is fulled, does it become cloth?

A. If it is fulled sufficiently. Some flannels may come so loose from the looms that they are too open, and they will be fulled slightly to bring the meshes together.

Q. As a general thing when cloths or flannels leave the loom, having become fulled, then do they become cloth?

A. If sufficiently fulled, but flannel is generally made more in the loom than it is in the fulling process.

Q. Should they fail to weave it close enough, then the process of fulling is exercised for the purpose of fulling it and making it closer?

A. Make it closer; flannel, if they full it enough, it will make it a cloth.

Q. When it comes from the loom is anything done to it?

33 A. Sometimes it is made entirely in loom, and other times it is sheared slightly to put a nap upon it.

Q. How do they full it when it comes from the machine?

A. Fulling-machines. It is wet and put in with soap and water and beaten together, and the longer it stays there the stouter it grows; sometimes they full it so much that it will stand up.

Q. Does that process ever make it into a cloth?

A. It would carry it into a cloth or kersey, or any of the various names that you call it. A kersey is a twilled cloth, a twilled woolen fabric.

Q. So is this a twilled woolen fabric?

A. It is a fabric; that is, fulled up so that it will make an entirely different article from flannel.

Q. Is this fulled at all?

A. I should judge it was fulled in the very slightest degree, and pressed. The pressing would tend to make it solid. It may not
34 have been fulled at all; it may have been steam pressed.

Court:

Q. Do they press flannel generally?

A. They do a good many flannels. It depends how rough the materials are, and how much it needs smoothing.

Q. Look at samples A & B, and see if there is any difference between them in that respect?

A. B looks as if it had been in the open air and handled more, and if there is any press on the goods it is on A; A, I should say, has been in the pressing-machine and pressed. It may have been fulled s'ightly. It can be made firm and solid by pressing and running through a press and under a machine.

Q. If either of these has been fulled it is A?

A. It is; and I should say that has been pressed, and the press is not out of it. This piece has been exposed.

35 Q. Then, if either of these has been fulled it is Exhibit A?

A. Yes; I should think it was pressed more than fulled. By "pressed" I mean by being put in what we call a cloth-press, with pasteboards and hot iron flats put in between so many layers and put into a hydraulic press to bring it down to a very compact shape, to make it as solid as possible, and woolen goods generally retain that for a long time after the press is through.

Q. Is that a part of the process of fulling?

A. Of all woolen goods, if you want to make them solid.

Q. Is it a part of the process of making cloth?

A. Yes, sir.

Q. Is that part of the process of fulling at all?

A. No, sir; it is pressing.

Q. And that, I understand you, is the process applied to cloth, if you carry it far enough?

36 A. All cloths are obliged to be pressed, and all cloths are pressed; flannels are pressed very many times.

Q. If a piece of flannel were pressed enough in that way, would it not make it into what you call woolen cloth?

A. No, sir.

Q. Why not?

A. Because you could not press it enough to bring it together after the manner of fulling cloth. It might make it firm, but it would not bring it into that solid manner like fulling.

Q. Would it make it firm enough to make a serge?

A. I don't think it would.

Q. What is a serge?

A. It is generally either silk and worsted, or worsted and cotton, or silk and cotton. It is not made of carded wool. A melton is a piece of cloth which is woven, generally, what we call plain, without be-
37 ing twilled; and it undergoes the severest fulling process of almost any goods that are made—made very firm by the fulling-process. It is fulled so much together that it becomes exceedingly solid and firm.

Q. And that is about the difference really between a melton and felt?

A. A felt is generally made of a pulp of wool; that is, put on a frame

something like paper is made; but a melton is made woven threads of wool, and that may be either a wool or wool and cotton and then fulled.

Q. You know what they call water-proofs?

A. Yes, sir.

Q. Is not that pressed?

A. I should generally say that ought to be pressed.

(Another sample produced by the district attorney, marked "Exhibit Q," and shown witness.)

Q. What is that? (Ex. Q?)

A. That is what we know in the trade as repellants. The
38 difference in that and the article I have last described is that the wool is thrown upon the face of that, and that has been teasled and sheared and pressed, too.

Q. Is flannel ever made in that way?

A. I should not think it was; I never saw any made in that way.

Q. And has not the outside of this the same appearance as flannel?

A. I never saw it have the same appearance as flannel; that is, repellant; but it is sometimes called water-proof; but I would not like to be out in a heavy rain with one of them on.

Q. So that I understand you to say that if either of these goods has been fulled it is Exhibit A?

A. Yes, sir; and I should say this has been pressed and not fulled, but it may have been fulled slightly.

Q. I want to ask you whether you have ever read, or heard read to you, the examination which has been annexed to these two exhibits?

39 A. I have looked it over very slightly.

Q. Did you observe that there was anything said on the subject of the difference between the two pieces of goods?

(Objected to as immaterial.)

Q. I ask you whether you read that commission so as to say what the difference was between these two exhibits?

(Objected to.)

A. I glanced at the commission, and read so far down as where the agent of the Woonsocket Mills, at Providence, of which we are the agents in selling the goods here, testified that it was a flannel.

Q. And that is all?

A. Yes, sir.

Q. And didn't see anything else?

A. No, sir; I did not.

Redirect:

Q. Upon each fibre of wool is there not a beard—something that can be seen by a microscope?

A. If you have ever noticed a sheep, it has white hair, instead of wool.

40 Q. What is it that causes the fibres of the wool when they are fulled to work in together?

A. All I can say is, that it is the nature of the wool. Some wool will full a great deal closer and finer than others. I never knew of a beard on wool.

Q. Do you not know that the hair has a little beard on it?

A. I know that the hair has a capillary.

Q. Tell me what the process of fulling is—how it is done.

A. As I have said before, the fulling is done, as a general thing, through

what they call a fulling-machine, with large blocks of wood or boxes. These blocks move backward and forwards, and this cloth is put in there, and it is saturated with soap and water, sometimes hot and sometimes cold, and these shove backwards and forewards, and beat that cloth and hammer it together until it has got sufficient solidity to take out
41 and use for such purpose as they want to manufacture. It works it up, kneads it together. It works everything in together. Nothing can escape from it.

Q. Your hat, what is that?

A. That is wool—that is fur, I think. That is made by a fulling process. I don't know whether the machines are the same in that as they are in wool, because I am not acquainted with it.

Q. Are you acquainted with any cloth as they make felt hats of?

A. Yes, sir.

Q. Where is that made?

A. Norwalk; and there are two or three others that manufacture that —Norwalk Felting Company and the Winnipauk——

Q. Now, is that a process of fulling exclusively?

A. I think that is made upon laying open layers, or something the same as you would make paper; it is made in a pulp and beat to-
42 gether. I am not so familiar with the process of that as I am with other goods. I think you can get it answered better than I can. I have seen it made. I am quite confident it is a process of fulling.

Q. And the method of fulling is beating the different fibres of wool one into the other. Take a piece of cloth that is fulled—the result of fulling is that you can or cannot see the threads?

A. Fulling puts the threads out of sight and gives a surface which can be combed and finished; has a tendency to conceal the threads.

Q. You say that they use this process of fulling to a slight extent sometimes on flannels?

A. It is done sometimes on flannels, but not as a general rule.

Q. Will you look at Exhibit B and state whether that is fulled at all, according to your judgment?

A. I should hardly think it was.

Q. I understood you to say on your cross-examination that
43 flannels frequently, and perhaps generally, came of a single width.

A. Yes; they are more of this than double, but they sometimes come double. The fact that they are in double width does not affect the question of their being or not being flannel. This article is used generally for shirts.

Q. For what purpose is the inferior article to that used, of which you spoke on your cross-examination?

A. Used for shirts, mostly.

Q. And that inferior article that you spoke of, is it or is it not a flannel?

A. A flannel.

Juror:

Q. If a manufacturer of cloth in manufacturing cloth which was woven loose sent it into the market without fulling, would it be called a flannel?

44 A. It would be generally accepted as a flannel.

Recross:

Q. Is there any article of woolen manufacture of a lower grade than

this, and of the same general kind of manufacture, that is not called a flannel?

A. I cannot call to mind any that is.

Q. What kind of stuff was that that you speak of as having been worth, in '64, about 15 or 17 cents a yard?

A. That is stuff made by the Stolls up the Hudson, about 26 inches wide.

Q. So that there isn't anything of a lower grade than this that is known in the market as a class of woolen goods?

A. I don't know any lower class of woolen goods than flannels. They generally are the lowest class of anything that is made of woolen.

Q. So that there is no class of woolen goods, to your knowledge,
45 of a lower grade but what is called a flannel?

A. I didn't say that. I say I don't know of any. I don't know what it would be, if it was not a flannel, if it was poorer than that.

Q. Look at Exhibit B, and tell me certainly whether you think that is fulled or not, or whether it has been fulled some time?

A. It may have been fulled a little, but not much; it don't look so now.

Q. Do you feel positive?

A. I told you I did not think it was. It looks to me as if it had been opened and in the air, and exposed a good deal. Steam would not take all the fulling out?

Q. Could not the fulling be taken out?

A. It could by tearing it to pieces again, no other way.

Q. On the whole, what do you say that is?

A. That has been fulled very slightly, indeed. I am inclined to
46 think it has not been fulled. I should say it might have been pressed some time or other.

Plaintiffs' counsel then produced in evidence the entry New York, December 24th, 1863. It is as follows:

47 *4,304

Entry of merchandise imported by William Watson & Co., in the Brit. str. Edinburgh, whereof

Marks.	Nos.	No. of packages.	Description of goods.	Quantity.	20 per cent.
E	213	One	Case woolens *Man. wool & cotton under 12 oz., 605 lbs.—35, 18.		
F	15, 16	Two	Cases do *Man. wool & cotton under 12, 887 lbs.—35, 18.		
G	281 @ 291, 293 @ 302.	Twenty-one.	Cases cotton & worsted *Man. worst'd, $624 @ 35%. W. & cotton, as delaine, 36,348 yds.—30, 2 c.—$5, 957.	58, 790 yds.	
E	472 @ 476	Five	Cases cotton & worsted *Man. W. & cotton, $431, @35%. W. & cotton, as delaine, 5,659 yds., 30, 2—$1,505.	9, 996 "	
L W	5 @ 7	Three	Cases do *W. & cotton, as delaine, 7,194 yds. 30, 2—1,276 fr. 35 to 30%.	10, 791 "	
T	362	One	Bale linens *Man. flax over 30 c., 540 yds., 35%.	442[2] "	
A 3	36 @ 46	Eleven	Bales woolens *Man. wool & cotton less than 12 oz. 7,984 lbs.—35, 18.		
J B 3	5	One	Truss-blankets } * Blankets under 28 c., 18,903 lbs., 15, 6 c		
	409, 410, 488–491, 530, 550, 551, 574, 597–600, 602, 622–625, 628, 649–653, 673.	Twenty-six	Bales blk'ts		
	694, 695, 717	Three	Bales blankets *Blankets over 28 c., 1,776 lbs., 30, 6 c.		
			Comm. 1½ % on £398 18 5 " ½ % " 44 0 4 Shipping chgs		
W W & Co N Y	154 @ 157	Four	Cases linens Less chgs. to L'pool	6, 124 yds.	248 2 0 2 1 9
			*Man. flax under 30, 4,820 yds., 30%. Comm. 1½ % Shipping chgs		246 0 3 3 13 9 4 0
H C	129 @ 131	Three	Cases linens *Flax under 30 c., 3,154 S. Y. D. Comm. 1½ % *30%. Shipping chgs	4, 206 yds. *30%.	124 16 1 1 7 2 3 0
15	60	One	Case linens Shipping charges *Man. flax under 30 c., 1,353 S. Y., 30%.	1, 803 yds.	63 5 0 1 0
*E. A. L. S Sope, C. H. D.			[†Blankets { 8, 835 lbs. @ 6c 4, 084 @ 15 [†Do. { 1, 700 lbs. @ 6c 553 @ 30 [†Woolens { 9, 476 lbs. @ 18c 4, 572 @ 35 [†2, 127 @ 30 [†9, 961 @ 35	[†530 10] [†612 60] [†102] [†165 90] [†1, 705 68] [†1, 600 20] [†638 10] [†3, 486 35]	
			J. M. S. P'd Dec. 26.—W. D. R.	[†$8, 840 93]	
			[*Am'd duty 9, 976. 01] [*D'y p'd 8, 840. 93]		
			[*Increase $1, 136. 08]		
			[*Amended duty $10, 023. 64] [*Orig. " 8, 840. 93]		
			[*Inc 1, 182. 71] [*I. R. L. [*I. W.]		

NOTE.—Words and figures inclosed in brackets are erased; those preceded by an asterisk (*) are written

[Two fifty-cent stamps—entry of goods—attached and canceled, Dec. 29, '63.]

Roskell is master, from L'pool. NEW YORK, DEC. 24TH, 1863.

30 per cent.	35 per cent.	6 c. lb.	15 per cent.	6 c. lb.	30 per cent.	18 c. lb.	35 per cent.	Total.
						605	78 12 11	
						887	136 12 6	
	1,343 16 1							L'pool.
	398 18 5							
	263 10 11							
	44 0 4							
						7,964	728 14 6	
		8,835	842 9 5					
				1,700	114 3 9			
	2,050 5 9		842 9 5		114 3 9		943 19 11	3,950 18 10
	5 19 3							
	4 5						0 0	6 3 8
	1 10 0		1 7 0		3 0		14 0	3 14 0
		*$5,872	*@ 35%	*$2,055 20				
		*11,418	*@ 30%	*3,425 40				
		*4,084	*@ 15%	*612 60				
		*20,679 lbs.	*6 c.	*1,240 74				
249 18 0		*9,476 "	*18 c.	*1,705 68				Belfast—Leeds.
		*49,201 "	*2	*984 02				
				*$10,023 64	*I. R. L.			
126 6 3								
63 6 0								
439 10 3	2,057 19 5		843 16 5		114 6 9		944 13 11	
$2,127	$9,961	lbs. 8,835	$4,084	lbs. 1,700	$553	9,476 lbs.	$4,572	

WILLIAM WATSON & CO.

*Amended duty	$10,023 64
*Original "	8,840 93
*Increase "	$1,182 71

P'd 24 M'ch.—W. D. R.—R.—Em.

[*2,629 lbs. 6 c	1,237 74]
[*4,084 " 15 "	612 60
[*11,418 " 30 "	3,425 40
[*9,476 lbs. 18 c	1,705 68]
[*5,795 35 "	2,028 25]
[*48,317 yd. 2 "	966 34]
	$9,976 01]

in red ink, and those preceded by a dagger (†) are written in blue ink, in the original.—PRINTER.

(On back:) C. H. C.

DISTRICT AND PORT OF NEW YORK:

Consignee's, importer's, or agent's oath.

I, Wm. G. Townley, do solemnly and truly swear that the invoice and bill of lading now produced by me to the collector of New York are the true and only invoice and bill of lading by me received, of all the goods, wares, and merchandise imported in the Edinburgh, whereof is master, from L'pool, for account of any person whomsoever for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were atually received by me; and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares, and merchandise; that the entry now delivered to the collector contains a just and true account of the said goods, wares, and merchandise according to the said invoice and bill of lading; that nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport' to have been made; and that if at any time hereafter I discover any error in the said invoice, or in the account now rendered of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear, that to the best of my knowledge and belief, Marshall & Co., of Leeds, are the owner' of the goods, wares, and merchandise mentioned in the annexed entry; that the invoice now produced by me exhibits the fair market-value at Leeds, Dec. 5, '63, in stg., of the said goods, wares, and merchandise, all charges thereon, and no other or different discount, bounty, or drawback, but such as has been actually allowed on the same.

WM. G. TOWNLEY.

Sworn to this 26 Dec., 1863, before me.

G. W. EMBREE,
Collector.

(Across the face in blue ink:) 213, 476, 46, 550, 54, 130, 60.

C. H. C.

Owner's oath in cases where goods, wares, or merchandise have been actually purchased.

I, Wm. G. Townley, do solemnly, truly swear that the entry now delivered by me to the collector of New York contains a just and true account of all the goods, wares, and merchandise imported by or consigned to Wm. Watson & Co., in the Edinburgh, whereof is master, from L'pool; that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares, and merchandise, of all charges thereon, including charges of purchasing carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback, or bounty, but such as has been actually allowed on the same; that I do not know nor believe in the

existence of any invoice or bill of lading other than those now produced by me, and that they are in the state in which I actually received them; and that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport to have been made. And I do further solemnly and truly swear that I have not in the said entry or invoice concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on said goods, wares, and merchandise; and that if, at any time hereafter, I discover any error in the said invoice, or in the account now produced of the said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district.

WM. G. TOWNLEY.

Sworn to this 26 day of Dec., 1863, before me.

G. W. EMBREE,
Collector.

(Indorsed:) 4304. Import entry. William Watson & Co. Edinburgh, (J. 5,) Dec. 26, '63. Jan. 5. Additional duty, Mch. 24, '64. 118,271. Liquidated and notified importer, Mar. 11, 1864.

48 Plaintiffs' counsel then put in evidence the invoice containing, with other goods, the goods in controversy, which invoice was dated Liverpool, December 8th, 1863; an invoice from William Watson & Co. to William Watson & Co., by the steamer Edinburgh. Attached to the invoice was the usual consul's certificate, and upon the invoice the goods were described as follows:

A 3	36, 24 ends $\frac{6}{4}$ woolen serges, $\frac{50}{52}$ in 1,056	16	70	8
821 lbs. bds., m'k'g up, &c., 12*s*.; p'k'ges, 25*s*.		1	17	72 5
	37, 24 same, 102 16		68	14
785 lbs. bds., m'k'g up, &c		117	69	18 4
	38, 24 same, 10,444	16	69	12 4
807 lbs. bds., m'k'g up, &c		1 17	71	9 4
	39, 24 same, 1,040$\frac{3}{4}$	16	69	7 8
801 lbs. bds., m'k'g up, &c		1 17	71	4 8
	40, 24 same, 1,038$\frac{3}{4}$	16	69	5
756 lbs. bds., m'k'g up, &c		1 17	71	2
	41, 24 same, 1,033$\frac{3}{4}$	16	68	18 4
782 lbs. bds., m'k'g up, &c		1 17	70	15 4
	42, 21 same, 905$\frac{1}{2}$	16	60	7 4
49 674 lbs., bds., m'k'g up, &c		1 14	62	14
	43, 21 same, 911$\frac{1}{4}$	16	60	15
693 lbs. bds., m'k'g up, &c		1	14	62 9
	44, 21 same, 905	16	60	6 8
706 lbs. bds., m'k'g up, &c		1	14	62 8
	45, 21 same, 932$\frac{1}{4}$		16	62 3
726 lbs. bds., m'k'g up, &c		1 14	63	17

Plaintiffs' counsel then put in evidence the protest dated March 24th, 1864, which is as follows:

50 NEW YORK, *March* 24, '64.

HIRAM BARNEY, Esq.,
Collector of Customs.

SIR: We hereby protest against the payment of eighteen cents per pound and thirty-five per cent. ad valorem duty on ◇ 36 & 45 ten bales as a manufacture of wool, or wool and cotton, per str. Edinburgh, claiming under existing laws they are entitled to entry as flannels, paying a duty of thirty-five per cent. ad valorem.

We pay the amount exacted in order to get possession of the goods, claiming to have the difference refunded.

WILLIAM WATSON & CO.

51 Also a copy of the appeal by plaintiffs to the Secretary of the Treasuary, as follows:

(Copy.)

29 PARK PLACE,
New York, March 15th, 1864.

The Hon. S. P. CHASE,
Secretary of the Treasury, Washington, D. C.

SIR: On the 26th December, 1863, we imported in the steamship Edinburg, from Liverpool, ten bales goods, marked ◇ A 3 ⁄ 36–45, which were invoiced as woolen serges, but known in this market as grey flannels. The appraiser returned them as a manufacture of wool and cottons under 12 oz. per square yard, and thereby subjecting them to a duty of thirty-five per cent. ad valorem and eighteen cents per lb. We called a re-appraisement in which were many witnesses. Those
52 connected with the domestic business of this country, without exception, pronounced them flannels, while English merchants stated they were known as serges, who also pronounced an American flannel, of which we exhibited a sample, to be a serge.

We now enclose a sample of the goods, and would ask you to make a decision in the matter, as the finding of the merchant appraisers is in accordance with the above statement; and that the goods are manufactured of wool-waste and under the 12 oz. to the square yard, and the entry has been liquidated at the woolen duty.

Your obt. svt.,
(Signed) WILLIAM WATSON & CO.

Also a letter from the Secretary of the Treasury, as follows:

53 (Copy.)

TREASURY DEPARTMENT, [M. Bf.
March 21st, 1864.

GENTLEMEN: Your appeal, dated March 15th, is received, from the decision of the collector, at New York, assessing a duty of 35 per cent. ad val., and 18 cents per pound on your importation of (so styled) woolen serges or grey flannels, per steamship Edinburgh, from Liverpool.

The article in question is of the same character and kind of goods on which the Department, in its circular of November 16th, 1863, rendered a decision, with perhaps this exception, viz, there may be a small quan-

tity of wool-waste in that imported by you. A copy of the printed decision is herewith transmitted.

The decision of the collector is hereby affirmed.

54 I am, very respectfully,

S. P. CHASE,
Secretary of the Treasury.

To Mess. WM. WATSON & CO.,
No. 29 Park Place, New York.

Shirting-flannel, (so called.)

TREASURY DEPARTMENT,
November 16th, 1863.

SIR: J. Lewine has appealed from your decision assessing duty "as a manufacture of wool and worsted," at the rate of 18 cents per pound and 35 per cent. ad valorem on certain goods imported by him, and styled "grey flannel of English manufacture, intended to be used for army shirting," and claims to enter it at 35 per cent. only, under the classification for "flannels."

55 The article in question was not, at the time of the passage of the present tariff, known or commercially recognized as flannel, nor is it flannel according to the term as well known and understood, differing from flannel in texture and dressing, being fulled, which at once takes it out of the flannel category.

The tariff acts now in force impose a duty of 18 cents per pound and 35 per cent. ad valorem on manufactures of wool, or of which wool shall be a component material, &c., &c., not otherwise provided for; and, in my opinion, the article in question comes clearly within this provision of the law, and your assessment was perfectly regular.

Your decision is hereby affirmed.

I am, very respectfully,

S. P. CHASE,
Secretary of the Treasury.

56 To HIRAM BARNEY, Esq.,
Collector, &c., New York.

SAMUEL WARREN sworn for plaintiff:

I am now a clerk with Wm. Watson & Co., and in 1864 was their custom-house clerk.

Q. Do you know who paid the duty on that?

A. That was me. It was paid March 24th, 1864.

Q. And on what day was the protest delivered?

A. I have no positive recollection, but as far as I know I think it was deposited the same day. The protest is in my handwriting.

Cross-examined:

I made the entry.

Q. And is this in your handwriting, on the entry, viz, under the column marked, "Nos. and description of the goods."

A. Yes, sir.

57 Q. Who wrote that in red ink—"Amended duty, 10,023.64; original duty, 8,840.93; increase, 1,182.71?"

A. The amendment clerk.

Q. You made this entry for the plaintiffs on the 24th of December, 1863, or on or about that time?

A. Yes, sir.

Q. Those are the goods in controversy in this action?
A. (PLFFS' COUNSEL, (Mr. Smith.) That is admitted.
Summons in this case dated April 2, '64, put in evidence by plff.
DEFENDANT'S COUNSEL, (Mr. Tremain.) That is admitted.

58 [John W. Amerman, printer, 60 William street.

Summons for money demand on contract.

Court of common pleas for the city and county of New York.

[50-c. int. rev. stamp.]

WILLIAM WATSON AND WILLIAM J. TOWNLEY *against* HIRAM BARNEY. } Com. not ser.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the court of common pleas for the city and county of New York, at the City Hall in the city of New York, and to serve a copy of your answer to the complaint on the subscribers at their office, No. 31 Nassau street, corner of Cedar, (Bank of Commerce building,) in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiffs in this action will take judgement against you for the sum of three thousand dollars, with interest from the twenty-fourth day of March, one thousand eight hundred and sixty-four, besides the costs of this action.

Dated New York, April 2, 1864.

MARTIN & SMITH,
Plaintiffs' Attorneys.

(Indorsed.) D. 443. N. Y., common pleas. William Watson & ano'r against Hiram Barney. Copy summons. Martin & Smith, plaintiffs' attorneys.

59 At this point, in response to an enquiry from defendant, plaintiffs' counsel stated that the proof as to notice of protest, appeal, and other statutory preliminaries concerning the regularity of the plaintiffs' action was completed.

The defendant's counsel, by permission of the court, then moved that a verdict be directed for the defendant, upon the ground that the protest, being on March 24th or March 25th, 1864, was not within ten days of the date of ascertainment and liquidation of the duties according to the statute, the date of liquidation having been shown by the entry and the writings upon it to be March 11th, 1864.

At the conclusion of the argument upon this motion a recess was had, and thereupon plaintiffs' counsel, by permission of the court, pro-
60 duced further testimony upon this topic, and the following proceedings took place:

Mr. Smith puts in evidence the following notice to produce papers, with an admission of service. It is dated May 24th, 1873.

61 Circuit court of the United States for the southern district of New York.

WILLIAM WATSON & O'RS.
agst.
HIRAM BARNEY.

Take notice that the defendant is required to produce on the trial of this action the following papers, to wit: The entry of the ten bales, marked A 3 # 36 a 45, dated December 24th or 26th, 1863; the decision of the collector assessing the duty of eighteen cents per pound on said importation; the notice of dissatisfaction served upon the collector; the plaintiffs' appeal from his decision to the Secretary of the Treasury; the decision of the Secretary of the Treasury upon such appeal; and the report made by said collector to the Secretary of the Treasury on or about the 18th day of March 1864; and in default of such production, parol evidence of the contents of said papers, and of each and every of the same, will be given.

Dated New York, May 24th, 1873.

MARTIN & SMITH,
Plffs'. Attys.

To GEORGE BLISS, Jr., Esq.,
Defts.' Atty.

(Indorsed:) U. S. circuit court. William Watson & ors. agst. Hiram Barney. Copy. Notice to produce. Martin & Smith, attys. for plffs. To Geo. Bliss, jr., esq., defts.' atty.

62 WILLIAM J. TOWNLEY, sworn for plaintiff.

Examined by Mr. Smith:

I am a partner in the firm of Wm. Watson & Co., dry goods. Have been in that firm 12 years. I remember the transaction of the importation of these goods spoken of here to-day. I was in the firm then.

Q. Do you remember at or about what time the final payment of duties was made?

A. It was March 24, 1864.

Q. Before that final payment did you at any time hear that the entry was liquidated?

(Objected to; what the witness has heard as being done in the custom-house is entirely immaterial.

COURT. It is not admissible for the purpose of proving the fact, but he can refer to that for the purpose of fixing the date in his mind.

Defendants' counsel duly excepted.)

A. I did.

63 Q. At about what time did you so hear?

(Same objection, ruling, and exception.)

A. It was early in March.

Q. After so hearing did you do anything? Did you draw any paper?

A. I did.

Q. What was the paper?

(Objected to.)

Q. What did that paper contain?

(Objected to.)

Q. Did you deliver any paper to the collector?

A. I don't know what I did personally.

Q. What is your recollection.

A. To the best of my recollection, I gave it to the custom-house clerk to deliver.

Q. Did you draw that paper yourself?

A. I think not. I signed it.

Q. Do you know what the paper contained, to the best of your recollection?

(Objected to.)

Mr. TREMAIN. Before evidence can be given, I claim the right
64 to examine this witness in order to identify the paper that is claimed to be lost, or not produced by defendant.

Q. Will you state what that paper contained?

(Objected to; objection overruled; defendants' counsel duly excepted.)

A. The purport of that paper was that we objected to the goods being liquidated as woolen goods, and subject to the higher duty; that we claimed they were flannels, and were subject to a duty of 35 per cent. ad valorem.

Q. (Court.) When was that?

A. It was early in March.

Q. Do you remember the notice of appeal? (Handing paper to witness.)

A. Yes; I wrote this myself.

Q. Can you tell, by looking at the date of that, on what day the notice of appeal was served?

A. It was served on the collector on the 15th of March, 1864.

Q. Within how many day before the 15th was this notice that
65 you speak of drawn? Was that within 10 days before that?

A. I should say it was within the 10 days.

Q. To whom was the notice of appeal delivered?

A. I believe it was delivered to our custom-house clerk to hand to the collector.

Q. Do you know whether two copies were made—one sent to Washington and one to the collector?

A. I don't recollect as to that?

Q. The notice that you have now spoken of—what is the date of the paper I now show you?

A. March 24th, 1864. (The protest above referred to.)

Q. Was the paper you have previously spoken of that paper, or a different paper?

A. It was a different paper.

Cross-examined:

Q. To whom did you give the paper that you drew?

A. To the best of my recollection, I gave it to the entry clerk to convey to the collector.

66 Q. And you think you drew two papers, do you?

A. I don't understand what you mean by two papers.

Q. You say you drew an appeal to the Secretary of the Treasury?

A. Yes, sir; that was on the 15th.

Q. You say you also drew another paper that was not this one?

A. Yes, sir.

Q. When did you draw the appeal to the Secretary of the Treasury.

A. I think it was on the 15th of March.

Q. When was that mailed?.

A. It was sent to the collector.

Q. Do you know when it was delivered to the collector?

A. It was on the same day, I believe, it was sent to the custom-house. I can't say positively, but I am pretty sure.

Q. But you don't know anything about it—you didn't deliver it?

A. No. I gave it to the custom-house clerk; he did all the business.

Q. So that you cannot say of your own knowledge when it was delivered?

67 A. No, I cannot.

Q. And is not that the same way about the other paper that you drew?

A. No; I didn't deliver it in person.

Q. When did you give it to the custom-house clerk?

A. It was early in March. I can't recollect the date.

Q. And was it a draft of a paper for him to prepare that you drew, or an original signed by you?

A. I think it was, probably, signed by me.

Q. Was it a draft of a paper, or a paper that he was to make a copy from; was it a paper that he was to deliver himself, or was he to make a copy from it?

A. He was to deliver it himself at the custom-house.

Q. What did you say that paper stated?

A. That we objected to the goods being assessed at the higher duties, but that we claimed they were flannels and subject to the duty of 35 per cent.

68 Q. How did you come to write another paper of the same purport?

A. When we paid the duty we thought it was better to enter a protest against it.

Q. And that is the paper that you then drew?

A. Yes, sir, on the 24th of March.

Q. How came you to pay the duties on the 24th of March?

A. We waited to hear from the report of the Secretary of the Treasury on our appeal.

Q. (By the court.) Do you mean you delivered it to your custom-house clerk or the clerk at the custom-house?

A. Our custom-house clerk.

Q. Did you ever deliver to the custom-house any papers at all concerning this importation?

A. I don't know that I did personally.

SAMUEL WARREN recalled.

Examined by Mr. Smith:

Q. Have you heard Mr. Townley's testimony?

A. I have.

69 Q. Do you remember the paper of which Mr. Townley has spoken—the notice of dissatisfaction?

A. Yes, sir.

Q. Do you remember the service of that on the collector or deputy collector?

A. I am not positive.

Q. According to your best recollection?

A. It was.

Q. Who served it, according to your best recollection?

A. According to my best recollection, Mr. Townley and I were together when it was served.

Q. And about what time was that with reference to the 15th day of March, 1864.

A. It was within 30 days. It was in the early part of March.
Q. Within how many days before the 15th of March, according to your best recollection?
A. I won't say positive; within 10 or 11 days.
Q. Within about 10 days?
A. About that.
Q. According to your best recollection, would it exceed 10 days?
A. I could not positively say. I think it was about ten days.

Recross:

Q. When did you deliver that, (the protest?)
70 I have no positive recollection; that is, we made out and sometimes delivered them the day they were made, and sometimes the day following. I have no certain knowledge. It was probably delivered on the 24th of March; within a day or two of the 24th.
Q. What other papers did you deliver at that time?
A. There was another paper delivered at that time. I paid the duty and delivered the protest.
Q. What other papers had you delivered prior to that?
A. Notice of dissatisfaction.
Q. What day did you deliver it?
A. I don't know. I could not say positively. It was in the early part of March.
Q. To whom did you deliver it?
A. I don't know that I delivered it personally. I think Mr. Townley and I were together when it was delivered.
Q. To whom?
A. To the deputy collector.
Q. Where did he sit? What is his name?
A. I think it was B. F. Mudget.
71 Q. In the rotunda?
A. Yes, sir.
Q. And Mr. Townley was with you?
A. Yes, sir; to the best of my knowledge and belief.
Q. How many other papers did you deliver at the same time?
A. That was the only one.
Q. How came Mr. Townley to go with you?
A. When he went to the custom-house with me he generally went to swear to other entries, and I think while he was swearing to other entries this was delivered.
Q. Was he in the same part of the custom-house with you when it was delivered? Did he go to the deputy collector's office when this was delivered?
A. That is my recollection of it.
Q. And what paper was that?
A. Notice of dissatisfaction.
Q. Was that at the same time that you delivered this appeal, of which this a copy?
A. No, sir.
Q. Was it after that?
72 A. It was previous to that.
Q. About how many days?
A. I could not say positively—about ten days.
Q. And that is when you delivered the notice of dissatisfaction that you speak of, not this paper?
A. Yes, sir.

Q. About 10 days before you delivered this?
A. Yes, sir; if that is the appeal to the Secretary of the Treasury.
Q. About 10 days before this appeal was delivered by you?
A. Yes, sir; about that.
Q. How do you fix that 10 days?
A. That is dated the 15th, and it was somewhere about a week after the 1st of March. I believe it was after the 1st of March and before the 10th.
Q. Did you deliver any other papers concerning this importation to the custom-house?
A. I delivered the appeal to the secretary of the collector, I believe.
Q. Did Mr. Townley go with you then?
73 A. No, sir.
Q. Didn't you mail one at the same time?
A. I don't recollect.
Q. How do you fix the date when you served the notice of dissatisfaction as after the first of March and before the 10th?
A. I see by date on the entry; it must have been about that time.

Redirect:

Q. What is the date of the entry of which you now speak?
A. It was not the entry, it was the invoice I meant.
Q. Had you or had you not heard at the custom-house that the entry was liquidated before the 11th of March?
A. I had.
Q. About how many days before?
(Objected to; objection overruled; defendant's counsel duly excepted.)
A. Previous to the 6th or 7th.
Q. About that time?
A. Yes, sir; it may have been a day or two before that.

74 Recross:

Q. Who told you?
A. I presume it was handed to me by the amendment-clerk, as is customary.
Q. And was it or was it not then endorsed as liquidated?
A. It was not endorsed as liquidated, but it was liquidated.
Q. How do you know?
A. By seeing the entry.
Q. Show me what you saw that enabled you to know?
A. The course we had to take. "Increase 1,182.71 proved that it was liquidated and the amount demanded."
Q. And you saw that when?
A. Previous to the 6th or 7th of March, and about that time.
Q. And was that the same time that you took this paper, this notice of dissatisfaction?
A. No, sir; I can't say anything about that. The notice of dissatisfaction was served within 10 days from when I received the no-
75 tice of liquidation; that I am pretty positive of.
Q. Did you receive the notice of liquidation?
A. I did not. It was customary at that time to have our entries handed to us by the clerks for examination.
Q. Then you mean 10 days from the time that some one in the custom-house told you that?
A. Mr. Townley or I served the notice of dissatisfaction within 10 days from the time we received the notice of liquidation.

Plaintiffs' counsel here read in evidence the deposition of Oliver D. Freeman, in the words and figures following:

OLIVER D. FREEMAN, of North Providence, being duly sworn, doth depose and say as follows, in answers to interrogatories propounded by the counsel for the plaintiffs:

Q. Please state your age and occupation.

76 A. I am forty-nine years of age. I am a woolen manufacturer, and am superintendent of the Wauskirk Mills, North Providence. They are woolen-mills.

Q. Please state how long you have been employed as superintendent of the Wauskirk Mills?

A. About eight months. I have been employed as superintendent and agent of woollen-mills for about twenty years.

Q. Please examine the piece of cloth which I now show you, and state what it is particularly; whether it is or is not flannel. (See Exhibit A; the said piece of cloth being so marked and annexed to the deposition of witness by the commissioner. J. H. P.)

A. This piece of cloth is woolen-mixed flannel. What I mean by the the term woolen-mixed flannel is that it is different colors of wool mixed.

Q. Please state whether you have, at the request of the plaintiffs in this suit, cut off from the piece of cloth heretofore shown you, marked "Exhibit A," a piece out of which you have taken the finish. Please examine the piece of cloth I now show you, and state whether it is the same so cut off, and the difference between the same as it is now and as it was when your received it.

(See piece of cloth, marked "Exhibit B," which is so marked and annexed by the commissioner. J. H. P.)

A. The plaintiffs in this suit sent me a piece of cloth, a piece of flannel, I should call it, which I have cut into two pieces as nearly equal in size as I could. The piece marked "A" has the finish on it, as received, giving it the appearance of serge, but it is nevertheless flannel.

78 The piece marked "B," has the finish taken out, showing it to be nothing but woolen-mixed flannel. The finish alluded to consists in hot and hard pressing, pressing hard between papers with hot iron flats, and has been removed by being passed over a jet of steam and a brush.

Q. Please examine the piece of cloth which I now show you, and state what it is, and also please compare it with those heretofore examined and marked Exhibits "A" and "B," and state what the difference is between those and this.

(See Exhibit C, which piece of cloth is so marked and annexed by the commissioner. J. H. P.)

A. This is white worsted serge—the piece marked "C" I refer to. The material of which it is composed is worsted or combed wool. It always commands a higher price and costs more to fabricate it than simple woolen flannels of a similar quality, like samples marked "A"

79 and "B." The difference is that A and B are composed of wool not combed, but carded, spun, and woven, and which costs less, while C is composed of combed wool, which is more expensive. Serge is made from long-staple wool or worsted wools, while woolen-mixed flannel, or flannel or woolen goods of any kind, are made of short-staple wool, which could not be combed, and which could not be used for serge. The long-staple is taken out for the purpose of making serge, while the short-staple, after the long-staple is removed, is sometimes sold at a discount

on the cost-price, to be used in the manufacture of woolen-mixed flannel and other woolen goods of the lower grades.

80 I would add that the less the sample marked "A" is exposed to the air and to moisture the more marked will be the difference between A and B.

Q. Please state whether an article of serge could or could not possibly be manufactured which, when finished, would materially resemble the piece annexed and marked "Exhibit A."

A. I have never seen anything that was denominated serge which resembled the piece annexed and marked "Exhibit A," nor do I conceive how it could be done. I do not think any one acquainted with the articles of serge and of flannel would be likely to mistake one for the other, or would mistake the article marked "Exhibit A" for serge, although persons not acquainted with the article might sometimes be imposed upon and mistake it for serge.

81 (The plaintiff then produced further testimony by witnesses, who were orally examined and cross-examined, tending to show what were flannels, and that plaintiffs' Exhibits A and B belonged to the family of goods known commercially as flannels, and were in fact flannels, and so known commercially.

On the cross-examination of some of such witnesses, the defendant's counsel produced and showed to the witnesses the samples hereinbefore referred to as marked "Defendant's Exhibits 1" and "Defendant's Exhibits 2" respectively; and also other samples marked "Defendant's Exhibit 3," "Defendant's Exhibit 4," and "Defendant's Exhibit 5;" and some of said witnesses who had been examined by plaintiffs' counsel concerning plaintiffs' exhibits, A and B and C, and their manu-

82 facture, use, and commercial designation, were further cross-examined at length by defendant's counsel concerning the same samples, and also, in connection therewith, having examined samples marked "Exhibits 1, 2, 3, 4, and 5," testified concerning them; that is to say, for example, one Spencer W. Coe testified, on the direct examination, that he had been engaged in the dry-good business 18 years, and had been acquainted with flannels 10 or 12 years, and that A and B he should call a very poor quality of Union gray twilled flannel.)

On his cross-examination, defendant's exhibit 3 being shown him, he was asked:

Q. What is that? (No. 3.)

Ans. White twilled flannel, but pressed.

Defendant's exhibit 4 being shown witness, he was asked:

Q. What is that? (No. 4.)

Ans. That is G. S. M., a gray twill; that is a Union flannel

83 similar to this. A better quality dyed in the piece weighs $4\frac{3}{4}$ ounces, and both sides pretty much alike. It is known as G. S. M. or D. R. P., gray twilled flannel, just as your whole name is known.

Q. Is there not a difference in the wearing of plain flannel and twilled?

Ans. I suppose so.

Q. Is there a difference in the weave?

Ans. There is, but I cannot explain it.

Defendant's exhibit No. 5 shown witness.

Q. What is that?

Ans. This comes under the head of our cloth department. I call it ladies' cloth. It may be a very light melton. It is a well-known article.

Q. Does this come under the designation of flannel?

Ans. No, sir; that is a cloth.

Q. What is this?

(Exhibit No. 1 shown witness.)

Ans. That is blue twilled flannel, coarse stock; the other is white twilled flannel.

84 Others of plaintiffs' witnesses who testified concerning the samples Exhibits A and B testified also on cross-examination without objection concerning Exhibits 1, 2, 3, 4, and 5, said evidence being in respect to the appearance of said samples, their comparative weight and price, their manufacture and commercial designation. Some testimony was given as to which of said samples were or were not fulled.

It was proven that the samples Exhibits A and B were part of the goods imported by plaintiff upon which the excess of duties sued for was claimed to have been paid.

On the cross-examination of one of the plaintiffs, William Watson, he testified, among other things, as follows:

Q. How large an importation of this class of goods, like A and B, did you make in addition to these?

Ans. That is all.

Q. Did you make any since?

85 Ans. Not that I know of. I don't think we ever imported any before or since.

Q. Why did you import these particular goods when you hadn't bought any before or since?

Ans. We bought them to make a profit on.

Q. Were they or not used for army shirts?

Ans. I think they were.

Q. What makes you think so?

Ans. From what the appearance is.

Q. Did you not sell this importation for that purpose?

Ans. I don't know; our books will show.

Q. Will you look at your books and say at a subsequent stage of this trial?

The COURT. That is immaterial. I won't hear it; it has nothing to do with the case.

(Defendant's counsel duly excepted.)

Q. How many other kinds of flannels do you deal in?

Ans. We do not deal in flannels at all. * * * * *

86 Q. By what name did you sell these goods?

A. That I don't remember. I don't know, indeed. I did not sell them myself; my firm did.

The defendant, upon opening the case in his behalf, called—

PHILIP HERZOG, who, being sworn, testified:

My business is dry goods. I have dealt in woolen goods and flannels, and am acquainted with that class of goods. I have been for many years in Europe in dry goods, but from 1861 to 1870 I was U. S. appraiser, and had all those goods under my charge, and since then I am in dry goods and dealing. I am not now in the Government service.

Q. Please look at samples A and B, and tell me whether you have seen goods like these passing through the custom-house.

A. Yes, sir.

Q. Were they or were they not an extensive article of importation?

87 A. Not this particular kind; we had largely the light meltons; a plain woven article, but we had the very identical goods several times.

Q. Prior to 1861, or afterwards?

A. Afterwards; about 1862 they tried their hands in England to make all kinds of heavier goods, to answer instead of meltons or instead of flannels, and previous to this importation other goods were imported, as the letter of the Secretary of the Treasury tells you, and we gave it a thorough investigation at the time.

Q. Are you familiar with the article, in its various shapes, known in commerce before 1861 as flannels?

A. Yes, sir.

Q. Look at samples A and B, and see if that is the article?

(Objected to.)

COURT. Examine A and B, and tell the jury what they are known as.

(Defendant's counsel take an exception.)

88 A. They had no name; it was a new article entirely.

COURT. You have seen the article before?

A. Yes, sir; we used to call them kerseys; it is a kersey weave, but they never came so light as those, and we actually put them under the general class of manufactures of wool and cotton.

Q. And that is the way those goods were classified?

A. We had nothing to do with what they were, but with what they are not; they are not flannels, and consequently they come under the general class as all manufactures of wool and cotton.

Q. You are familiar with flannels?

A. Yes, sir; to a certain extent.

Q. What is a flannel?

A. It is a light-woven fabric in wool and cotton.

Q. What are the purposes for which flannels are ordinarily used?

A. Every man knows what flannels are used for.

89 Q. Is there any difference in the designation of articles on this side of the water than the names by which the same articles were known on the other side of the water prior to 1861?

A. I don't know prior to 1861, but I know there was a good many designations on the other side which are taken here in a collateral name or entirely changed.

Q. What is the article called bockings?

Mr. TREMAIN. I want to show that there were some articles named in this tariff that are allied to this in character, and that are known by different names on the other side of the water.

COURT, (to the witness.) Confine yourself to this article, if it is known on the other side by any other name.

Q. Do you know how goods similar to this are invoiced from the other side, or were invoiced, for instance, where they came to your knowledge?

90 A. It being so long ago—10 years—I cannot recollect every instance, but I recollect one instance; my memory was refreshed by the letter I heard from the Secretary of the Treasury; the goods of Lovine, and if you search the record he invoiced them as not named at all—just goods, so and so, number so and so, so many pieces one shilling and eight pence, or whatever the sum was, and they tried to enter them as flannels; there was no name at all.

Q. My question is in relation to goods precisely like samples A and B, whether you know or do not know such goods were invoiced from the other side to this country?

A. I did answer that; the exact goods; as I say, it had no name at all that I remember, for I didn't enter them under any name.

Q. Do you know the name by which these goods were known in the trade and commerce in this country?

91 A. No; I don't know what they called them here at the time.

WILLIAM H. NORTHUP, sworn for defendant.

Examined by Mr. Tremain:

I am clerk in the custom-house, N. Y. I have charge of the records of protest and appeals, and also the suit-dockets.

Q. What is the course and practice in the custom-house which results in what is termed a liquidation?

A. An entry is given to one of the liquidating clerks and there the duty is made up and checked, then it is passed over to the naval officer, who makes a copy of the entry, looks over the amount, and checks it off with his copy, then it is returned to the chief liquidating clerk, who has the entry stamped and notifies the importer; the date of the entry stamped and the importer notified is the final liquidation of the entry. That was the practice in 1863 and '4.

Q. When you say the duty is made up, do you mean written

92 by some of the clerks?

A. Yes, sir.

Q. Show me the stamp that you refer to, that is affixed when the entry is finally liquidated.

A. On the bottom of the entry.

Q. Please read it.

A. "Liquidated, Custom-House, New York, March 11th, 1864." The importer is notified on that day.

Q. Does it appear there that the importer is notified?

A. It is so stamped, and is always understood.

Q. Where were these goods in the mean time, between December, 1863, and March 24th, 1864?

A. The goods were supposed to be in the hands of the merchant; it is an import-entry, except certain packages which were sent to the warehouse for examination.

Q. When was the original duty paid by the merchant? Not the amount that the Government liquidated it at.

A. December 26th, 1863.

93 Q. But the date of the payment according to the liquidation was, according to that entry, what date?

A. The additional duty was paid March 24th, 1864.

Q. Did you make a search in the custom-house for any protest that was delivered there by Messrs. Wm. Watson & Co. between March 1st and March 30th, or about that time, 1864?

A. I did.

Q. Did you find the notice of protest or dissatisfaction recorded as having been received, and the paper itself, there during those days?

A. I did.

Q. Is that the paper? (Showing witness a paper.)

A. Yes, sir.

Q. What date was that received?

A. March 12th.

(Offered in evidence. Objected to; it has nothing to do with this case.)

Mr. TREMAIN. We claim that this is the only paper, prior to March 25th, received by us from Wm. Watson & Co., and that must be the paper they refer to.

94 Q. Look at the entry and also at that paper, and tell me if that protest relates to so much of the goods as are on this entry as are opposite "A 3" △ diamond?

A. No, sir, it does not.

Q. Is that the only paper you found or that you could find any record of in the custom-house prior to March 25th?

(Objected to.)

COURT. The paper itself is excluded, because the witness says it has nothing to do with this case.

COURT. Q. Did you find any other paper there?

A. No, sir.

[Erased: Q. Is it the course and practice of business in the custom-house to keep a record of all protests that are received, and also of all protests?

(Objected to; objection sustained; defendant's counsel duly excepted.)]

This erasure appears in the original. K. G. WHITE, *Clerk.* P. SHIELDS.

Cross-examined:

Q. How long have you been in the custom-house?

95 A. Since 1867.

Q. You were not there in 1864?

A. No, sir.

Q. Nor in 1863?

A. No, sir.

Q. Will you look at this paper, which has been shown you by the counsel on the other side, and tell me whether that does not relate to a shipment which arrived in the month of February, and in what year?

(Objected to because the paper itself has been excluded. Plaintiff's counsel: "I want to show that it does not relate to the same shipment as this." Objection overruled; exception by defendant's counsel.)

A. It refers to an entry by the Edinburgh, February 6th, 1864.

Q. When did she arrive?

A. I don't know; that is merely your date entered there; that is supposed to be your day of entry.

Q. This is per steamer Edinburgh from Liverpool, February 6th, 1864?

96 A. Yes, sir.

Redirect:

Q. That February 6th, 1864, refers to what date of entry?

A. It is supposed to refer to the date of their entry. It don't refer to the date of arrival at all.

(Objection withdrawn.)

Paper read by district attorney:

97 NEW YORK, *March* 10, '64.

HIRAM BARNEY, Esq.,
Collector of Customs:

SIR: We hereby protest against the payment of two cents per square yard, and thirty per cent. ad valorem on ◇G◇ 314 @ 317, ◇E◇ 513, 514, ◇TH◇ 1, 2; eight cases manufactures of cotton & worsted per str. Edinburgh, L'pool, Feb'y 6, '64, claiming under existing laws they are entitled to entry at thirty-five per cent. ad valorem. We pay the amount exacted in order to get possession of the goods, claiming to have the difference refu'ded.

WILLIAM WATSON & CO.

98 CHARLES G. HARMER, sworn for defendant.

Examined by Mr. Tremain:

I am importer of saddlery-goods, and was for some years.

Q. Please look at Exhibit 1, and tell me whether you are familiar with goods like that, and whether you know by what name they are known in the trade and commerce.

(Objected to.)

DEFENDANT'S COUNSEL. The object is to show that their witnesses are not experts in the class of goods they pretend to be experts in.

(Objection sustained; defendant's counsel duly excepted.)

Testimony closed.

Mr. TREMAIN. I move, on the question of the regularity of the suit, in that the preliminaries required by statute have not been complied
99 with, that the court direct the jury to find a verdict for the defendant.

The court declines so to direct, and defendant's counsel excepts.

The court charged the jury as follows:

GENTLEMEN OF THE JURY: This is a very plain case, and I can only see two questions which you are called upon to determine, and the first is whether a notice of dissatisfaction was ever served by the plaintiffs, and, if so, was it within the time prescribed by the law governing that subject; and in the second place whether these goods, which are the subject of the action, were flannels.

Now, a liquidation may be made in various ways, and it is not necessary that it shall be made on the entry, but it seems that it was in this case. A final liquidation is not necessarily a matter of record. It
100 is a mere record such as would be made by men of business to refresh their recollection.

In this case you have the testimony of two witnesses, Mr. Townley and Mr. Warren, who swear that notice of dissatisfaction was given to the Government, somewhere about the 10th or 11th of March, and if you believe that that was a notice of dissatisfaction in this case, that is sufficient, but if you believe it was some other notice of some other goods, why, of course, it is not sufficient.

Mr. Warren says that he saw the figures upon the entry which was shown him, he thinks, before the notice was given. The custom-house is not bound to give written notice of the liquidation, but it is entitled to have the notice of dissatisfaction given to it within 10 days. Now, did they get that notice of dissatisfaction? That is the question
101 for you to determine. There is no dispute about what the testimony is. One of the plaintiff's clerks testified that such a notice was given. It is claimed on the part of the Government that it was something else, and a notice of some other goods. Now, whether it was or was not, is the question for you to determine.

We then proceed to the next point, were these goods flannels?

It seems that they were imported, as, I think the entry is, "woolen serges." It is stated here that they are not serges. The plaintiffs claimed at that time and have always claimed that they were flannel, and so the evidence in this case shows. If there has been any evidence produced to the contrary, the court has failed to perceive it. If you find anything in the evidence tending to show that they are not flannels, you must consider that testimony.

102 The language in the statute is: "Flannels not otherwise provided for." There was no false entry on the part of the plaintiffs.

They claim that they are not liable for this additional duty, but that they are liable to pay only for flannels, and that the custom-house officers are in error in assessing them for the additional duty.

These are the only points in the case, and you must consider them and give such a verdict as you think the evidence requires.

If you believe the testimony on the part of the plaintiffs, and find that there was a notice of dissatisfaction served, and believe also that these goods were flannels, then your verdict must be for the plaintiffs for the amount claimed with interest.

Defendant's counsel excepted to that portion of the charge
103 wherein the court said that it was not necessary that the liquidation should be made on the entry, and that a final liquidation was not necessarily a matter of record, and that it was a mere record such as would be made by men of business to refresh their recollection.

Defendant's counsel also excepted to that portion of the charge wherein the court said if the jury believed that the notice said to have been given to the Government about the 10th or 11th of March was a notice of dissatisfaction in this case, it was sufficient.

Defendant's counsel also excepted to that portion of the charge wherein the court said that it was for the jury to determine if the custom-house received the notice of dissatisfaction within ten days after Mr. Warren saw the figures upon the entry, and whether such notice concerned this case.

104 Defendant's counsel also excepted to that portion of the charge wherein the court said that they failed to produce any evidence that the plaintiffs had not always claimed that the goods in question were flannels.

Defendant's counsel also excepted to the concluding portion of said charge, wherein the court said that if the jury believed plaintiffs' testimony and find that there was a notice of dissatisfaction served, and believed also that these goods were flannels, then the verdict must be for the plaintiffs for the amount claimed with interest.

Defendant's counsel also excepts to that part of the charge which comments upon the weight of testimony as to protest, and that part which says that either would be sufficient as to protest and appeal. I mean the dates of controversy.

105 Defendant's counsel requested the court to charge that, under the law and instructions officially published for the guidance of Government officers, neither the district attorney nor the court have the right to waive the requirements of the statute in respect to service of protest and notice of appeal and time of beginning suit.

The court declined so to charge, it being deemed by the court immaterial to the case, and defendant's counsel duly excepted.

Defendant's counsel also requested the court to charge the jury that—

If the jury believe that the date of the liquidation was in fact on the 11th of March, 1864, and that within 10 days thereafter no protest or notice of dissatisfaction was served on the collector, then the defendant is entitled to a verdict.

106 The court declined to change its charge in that respect, and defendant's counsel duly excepted.

Defendant's counsel then requested the court to charge the jury that the importer having imported the goods as serges and entered them as woolens, the duty was properly assessed at that rate.

The court declines so to charge, and defendant's counsel duly excepted.

The jury rendered a verdict for the plaintiffs for the sum of $2,235.72, gold.

And inasmuch as the aforesaid several matters of fact and exceptions do not appear by the record of the said trial and verdict, therefore, on the prayer of the said defendant, by his counsel, the said judge has signed and sealed this bill of exceptions this thirtieth day of
107 April, 1874, for the April term, 1873, of said court.

D. A. SMALLEY, *Judge.*

(Endorsed:) United States circuit court, southern district of New York. William Watson & als. Hiram Barney. Bill of exceptions. Filed Apl. 30, 1874.

108 Supreme Court of the United States.

HIRAM BARNEY, PLAINTIFF IN ERROR,
agst.
WILLIAM WATSON AND WILLIAM G. TOWNLEY,
defts. in error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes *to* the said Hiram Barney, by George Bliss, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendants against the said plaintiff; whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.' And the said plaintiff*s* pray' that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid, as the same appears more
109 fully therein, may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff, may be restored to those things which *they have* lost by reason of the said judgment.

GEORGE BLISS,
United States Attorney for Plaintiff in Error.

(Endorsed:) Supreme Court of the United States. Hiram Barney, plff. in error, vs. William Watson & Wm. G. Townley, defts. in error. Assignment of error.

Service of a copy of the within is hereby admitted.

MARTIN & SMITH.

Filed June 15, 1874.

110 United States of America to William Watson & William G. Townley, greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Hiram Barney is plaintiff in error and you are the defendants in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, & speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this ninth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

SAML. BLATCHFORD.

111 (Indorsed:) Hiram Barney, plff. in error, v. William Watson & Wm. G. Townley, defts. in error. Citation. Geo. Bliss, atty. for plff. in error.

We admit service of a copy of the within citation this 10th day of June, 1874.

MARTIN & SMITH,
Attys. for Defts. in Error.

Filed June 11, 1874.

(Indorsement on cover:) No. 207. Hiram Barney, collector of the port of New York, plaintiff in error, vs. William Watson and William G. Townley, S. New York, C. C. U. S. Filed 18th July, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

HIRAM BARNEY, COLLECTOR, &c.,
PLAINTIFF IN ERROR,
vs.
WILLIAM WATSON ET AL.

No. 207.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

HIRAM BARNEY, COLLECTOR, &C., PLAINTIFF in error,
vs.
WILLIAM WATSON ET AL.
} No. 207.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the plaintiff in error.

STATEMENT OF THE CASE.

Wm. Watson & Co., the original plaintiffs, now defendants in error, imported into New York City, of which port said Hiram Barney was then collector of customs, in December, 1863, certain fabrics, which they claimed to be "flannels," dutiable under then existing laws at 35 per cent. *ad valorem*, but which Mr. Barney held to be "manufactures of wool, weighing less than twelve ounces per square yard," and accordingly exacted an additional specific duty of 18 cents per square yard. This liquidation was confirmed by the Secretary of the Treasury, upon appeal made to him, and this specific duty was claimed to have been paid by Wm. Watson &

Co. under protest and notice of dissatisfaction. The existence, sufficiency, and timeliness of this alleged notice of dissatisfaction was one of the issues arising upon the trial of the cause. The statutes imposing these duties are not printed in this brief because no construction of them is sought, but the determination of various matters of evidence and practice. Those statutes are the act of March 2, 1861, c. 68, sec. 13, second paragraph, 12 Stats., 184, as amended by act of July 14, 1862, c. 163, sec. 9, 12 Stats., 552–'3, a single reference to which will answer all the purposes of this discussion.

The *dates* of the documents hereinafter mentioned, and the action had thereon, are to be carefully noted as of special importance. The original entry of the goods, found upon pages 14 and 15 of the Record, was made December 24, 1863, and the sum of $8,840.93 indorsed as paid December 26, 1863, upon which day it appears by the next pages (16 and 17) of the Record the entry was sworn to. The indorsement (found on page 17) states that the entry was liquidated and the importer notified of the liquidation March 11, 1864, and the additional duty of $1,182.71 paid March 24, 1864. The act of 1799, c. 22, § 36, 1 Stats., 655–'8, in force at the date of this entry, provides that the importer shall enter his goods within fifteen days after the ship-master reports their arrival, and prescribes the form of entry, the particulars it shall contain, and the oath by which it shall be supported. Among other requirements is a statement of the "packages and contents." Agreeably to this statute the original plaintiffs in their entry (Record, 14) described the packages, upon which this disputed duty was imposed as "one case *woolens*, two cases *woolens*," and "eleven bales *woolens*;" and took the prescribed

oaths (Record, 16, 17) to the truth of the descriptive and other statements contained in the invoice, entry, &c. The invoice (Record, 17) describes the whole importation (including the bales in controversy) as "woolen serges." The plaintiff in error, as collector, assessed a duty upon these articles, as "manufactures of wool and cotton, weighing less than twelve ounces a square yard," with the specific duty of 18 cents per yard as aforesaid. The importers, Wm. Watson & Co., contended that they were, in fact, merely "gray flannels," and therefore not liable to the specific but only to the *ad-valorem* duty. To substantiate this claim they introduced a witness, Spaulding, (and, subsequently other witnesses) (Record, 4 *et seq.*, folios 14 to 46) who swore to these goods being flannels. The collector, while putting in his defense, offered to show that these witnesses called by Watson & Co. to this point were not experts, but was not permitted to do so, and excepted. (Record, 32, folio 98.)

This is the last section (c. 98, § 5) of the act of March 3, 1857: "That on the entry of any goods, wares, and merchandise imported on and after the 1st day of July aforesaid, the decision of the collector of the customs at the port of importation and entry, as to their liability to duty or exemption therefrom, shall be final and conclusive against the owner, importer, consignee, or agent of any such goods, wares, and merchandise unless the owner, importer, consignee, or agent shall within ten days after such entry, give notice to the collector, in writing, of his dissatisfaction with such decision, setting forth therein, distinctly and specifically, his grounds of objection thereto, and shall, within thirty days after the date of such decision, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final

and conclusive; and the said goods, wares, and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding, unless suit shall be brought within thirty days after such decision for any duties that may have been paid, or may thereafter be paid on said goods, or within thirty days after the duties shall have been paid in cases where such goods shall be in bond." (11 Stats. at Large, 195.)

To show compliance with these statutes, Watson & Co. introduced the documents printed on page 18 of the Record, the first (folio 50) bearing date March 24, 1864, more than ten days after the collector's decision, made upon the 11th day of that month, according to the indorsement upon the entry, (folio 47;) but a witness called by the importers was allowed to state that the entry was in fact liquidated about the 6th or 7th of March or earlier, although before introducing such testimony the original plaintiffs had stated (Record, 20, folio 59) that their proof of the performance of the requisite statutory preliminaries was completed. The original defendant's counsel then moved for a verdict in his favor because the notice of dissatisfaction was not given within ten days after the liquidation of the entry. The trial of this cause commenced June 9, 1873, (Record, 3, folio 11,) and after the motion aforesaid a recess was taken by the court. Upon the resumption of the hearing the original plaintiffs introduced "further testimony upon this topic," (Record, 20, folio 60.) They first offered the notice by them served on the collector to produce certain specified papers, among which was "the notice of dissatisfaction served upon the collector," but *made no mention of any protest as distinct from such notice.* (Record,

21, folio 61.) Thereupon parol evidence was offered and received, against the objection of the defendant's attorney, who excepted thereto, tending to show a liquidation earlier than March 11, 1864, and a notice of dissatisfaction other than the protest aforesaid, dated March 24, 1864, given early in that month, as appears by the Record, pp. 22–25, folios 62–75. The defendant's attorney especially excepted (folio 64) to the judge's refusal to allow him to examine a witness as to the existence and identity of this paper, alleged to be lost or not produced, before proof was received of its contents; and to the parol testimony of its contents in the then state of the case on this point, the defendant having shown (Record, 30, 31) that no other papers than those produced, signed by Watson & Co., had been received at the custom-house, and that the paper of March 24, 1864, was "the notice of dissatisfaction" called for by Watson & Co.'s notice to produce. The defendant asked one of his witnesses what the article in controversy in fact was, but this question was excluded and exception taken, (Record, 29, folio 87,) as well as to the refusal to allow the collector to show by one of the defendants in error that this was a special importation for a particular use, and not a general and well-known article of commerce, (Record, 28, folio 85,) and to the exclusion of other testimony as to the character of the goods, and to show the witnesses previously called by the importers were incompetent, inexpert, or mistaken. (Record, 32, folio 98.)

A motion was made for a direction to the jury to find for the original defendant, because Watson & Co. had not conformed to the preliminary requirements of the statutes, and exception taken to the refusal to give this instruction. (Record, 32, folio 99.)

The portions of the instructions given by the judge to the jury (upon this state of facts and evidence) to which exception was taken appear in the assignment of errors.

ASSIGNMENT OF ERRORS.

In the trial of this cause and the charge to the jury the court fell into various errors, to wit:

First. It being shown that the goods were entered in December, 1863, and that no protest or notice of dissatisfaction was given until March, 1864, motion was made by the defendant's attorney (Record, 32, folios 98, 99) to have the jury instructed that the preliminaries required by the statutes hereinbefore cited had not been complied with, and that, for this reason, the verdict should be for the defendant below. The court declined so to instruct, but told the jury, in the charge: "In this case you have the testimony of two witnesses, Mr. Townley and Mr. Warren, who swear that notice of dissatisfaction was given to the Government somewhere about the 10th or 11th of March, and if you believe that that was notice in this case, that is sufficient;" which instruction and refusal to instruct were duly excepted to, (Record, 32, 33, folios 100, 103,) and were erroneous; especially so, in view of the fact that it was admitted that the importations in question were dutiable, and not exempt from duty. (See act of March, 1857, chap. 98, § 5, 11 Stats., 195, cited *ante*.)

Second. It appeared by the official indorsement upon the original entry, (Record, 17, folio 47,) introduced by the importers, that the duties were liquidated, and the importers notified of it, March 11, 1864; and, by the paper found at the top of page 18 of the Record, also introduced by them, that no protest or notice of dissatis-

faction was given until the 24th day of that month; upon which state of evidence the plaintiffs below rested their cause, (Record, 20, folio 59,) and the defendant's counsel moved that a verdict be rendered for the defendant. Subsequently, after a recess of court, and pending this motion, W. J. Townley, one of the firm of Watson & Co., was admitted to testify that *before* the final payment (made March 24, 1864) of the full amount of duties exacted, to wit, "early in March," he heard that this entry was liquidated; that he signed a certain paper, the purport of which he was then about to state when the collector's counsel objected, (as he had also objected and excepted to the admission of the witness's statement of what he had heard of the liquidation of entry,) and asked permission to cross-examine the witness "in order to identify the paper that is claimed to be lost, or not produced by the defendant," (Record, 22, folio 64,) but this was not permitted, and the inquiry as to its contents was renewed by the attorney for the plaintiffs below, objected to by opposing counsel, and admitted by the court, to which exception was taken. The answer was, "The purport of that paper was that we objected to the goods being liquidated as woolen goods, and subject to the higher duty; that we claimed they were flannels, and were subject to a duty of 35 per cent. *ad valorem*." (Folio 64.) It was delivered by the witness to their own custom-house clerk. Notice had been, before trial, served upon Mr. Barney's attorney to produce certain specific papers, including the entry, "the notice of dissatisfaction served upon the collector, the plaintiffs' appeal from his decision to the Secretary of the Treasury," &c., &c.; in accordance with which notice the papers aforesaid had been produced and used at the trial. In this state of

the case, the plaintiff in error contends that the admission of the testimony as to when the witness heard of the liquidation of entry and as to the existence and contents of the alleged notice of dissatisfaction, without opportunity first given to determine its identity, was erroneous.

Third. The next witness called was Samuel Warren, custom-house clerk of Watson & Co., who testified that he remembered the paper spoken of by Mr. Townley, was not positive as to its being served upon the collector or his deputy, but according to his best recollection it was so served "in the early part of March;" within ten or eleven days, "according to his best recollection," (he would not be positive,) before the 15th of March. He "could not positively say" that it would not exceed ten days, but replied, "I think it was about ten days."

Against the defendant's objection, and subject to exception, (Record, 25,) he further testified that, previous to the 6th or 7th of March, he heard at the custom-house that the entry was liquidated; also that he presumed it was handed to him by the amendment clerk "as was customary;" that it was not then indorsed as liquidated, but that it was liquidated as he knew by seeing the entry; that these words and figures, "increase, $1,182.71," proved that it was liquidated and the amount demanded; and that he saw this previous to the 6th or 7th of March, or about that time. He then swore that the notice of dissatisfaction was not given at that time, but was served (he was "pretty positive") within ten days from when he received the notice of liquidation; explaining that he did not himself receive that notice, but that "it was customary at that time to have our entries handed to us by the clerks for examination," and that either he

or Townley served the notice of dissatisfaction within ten days from the time they received the notice of liquidation. (Record, 25.)

The collector, contending that this evidence did not prove performance of the statute preliminaries, and that it was inadmissible to vary the indorsement and record of liquidation upon the entry made March 11, 1864, excepted thereto and requested the court to instruct that the statutes as to notice of dissatisfaction had not been complied with, which request was denied, (Record, 32,) in all of which the court erred.

Fourth. The facts being as stated in the preceding assignments, with the additional fact proved that "the date of the entry stamped and the importer notified is the final liquidation of the entry," (Record, 30,) and the request for an instruction that the statute preliminaries had not been complied with, having been made and refused, as aforesaid, the judge told the jury in his charge, this: "This is a very plain case, and I can only see two questions which you are called upon to determine; and the first is, whether a notice of dissatisfaction was ever served by the plaintiffs, and, if so, was it within the time prescribed by the law governing that subject? And, in the second place, whether these goods which are the subject of the action were flannels? Now, a liquidation may be made in various ways; it is not necessary that it shall be made on the entry, but it seems that *it was in this case. A final liquidation is not necessarily a matter of record. It is a mere record such as would be made by business-men to refresh their recollection.* In this case you have the testimony of two witnesses, Mr. Townley and Mr. Warren, who swear that notice of dissatisfaction was given to the Government somewhere

about the 10th or 11th of March, *and if you believe that that was notice of dissatisfaction in this case, that is sufficient;* but if you believe it was some other notice, of some other goods, why, of course, it is not sufficient. Mr. Warren says that he saw the figures upon the entry which was shown him, he thinks, before the notice was given. The custom-house is not bound to give *written* notice of the liquidation, but it is entitled to have the notice of dissatisfaction given to it *within ten days.* Now, did they get that notice of dissatisfaction? That is the question for you to determine. There is no dispute what the testimony is. One of the plaintiffs' clerks testified that *such a notice was given.* It is claimed on the part of the Government that it was something else, and a notice of some other goods. Now, whether it was or was not is the question for you to determine." The original defendant excepted to these instructions and now assigns them for error.

Fifth. The plaintiff in error assigns for error so much of the charge recited in the next preceding assignment as relates to the liquidation of duties upon the importations in controversy.

Sixth. The plaintiff in error assigns for error the instructions relative to the notice of dissatisfaction which are quoted in the fourth assignment of errors.

Seventh. Upon the facts hereinbefore stated, the plaintiff in error assigns for error the admission, against his objection and exception, of the aforesaid parol evidence of the liquidation of duties upon the goods in question.

Eighth. Upon said state of facts, the plaintiff alleges as error the admission of said parol evidence of an asserted notice of dissatisfaction or protest other than

that of March 24, 1864, found upon folio 50 of the Record.

Ninth. Upon the trial, Watson & Co. called several witnesses, whose statements were received as expert testimony, to prove that the importations in dispute were "flannels;" also, that they were not "woolen serges." Exhibits of similar goods were shown to them by the original defendant, to test their capacity and experience; subsequently the said defendant proposed to prove by other experienced persons, experts in the business, the true character of such exhibits, and that the original plaintiffs' witnesses were mistaken and were not qualified as experts; but was not permitted to do so, and excepted. (Record, 32, folio 98.) This ruling the plaintiff in error asserts to be erroneous.

Tenth. The collector proved, by William Watson, an original plaintiff, that the goods in question were the only importation of the article ever made by that firm, and then proposed to show, by further cross-examination of this witness, that the goods were a special importation, to wit, Army shirts, but was restrained from doing so by the court, and excepted. He now assigns this restriction as error. (Record, 28, folio 85.)

Eleventh. Upon the facts hereinbefore recited the court erred in not holding as matter of law that there was not competent proof of any other protest affecting this case than that set forth at folio 50, of March 24, 1864, and in not rejecting secondary evidence of any subsequent protest.

Twelfth. The court erred in leaving to the determination of the jury the date from which the time begins to run within which a protest must be filed, as hereinbefore set forth in the fourth assignment of errors, and

in not instructing the jury that the ten days' limitation began to run upon the 24th or 26th day of December, 1863, whichever was found to be the date of entry.

Thirteenth. The court erred in not instructing the jury that the date when the liquidation was made, to wit, March 11, 1864, was the one from which the ten days within which the notice of dissatisfaction to be given the collector began to run, and in leaving this question to the jury.

Fourteenth. Upon the original entry, sworn to by the original plaintiffs, the goods in dispute were described as "woolens," and in the invoices as "woolen serges." It was proved and admitted that flannels and serges were distinct articles. In his charge, immediately after the portion quoted in the fourth assignment, the judge went on to say: "We then proceed to the next point, were these goods flannels? It seems that they were imported as (I think the entry is) woolen serges. It is stated here that they are not serges. The plaintiffs claimed at that time, and have always claimed, that they were flannels, and so the evidence in the case shows. If there has been any evidence produced to the contrary, the court has failed to perceive it. If you find anything in the evidence tending to show that they are not flannels, you must consider that testimony." This instruction was erroneous.

Fifteenth. The court erred in refusing the requested instruction that, as the importers had declared to the collector in their entry under oath and the invoices returned to him therewith that these goods were woolens and serges, he had a right to exact the specific duty to which woolens and serges of that weight per yard were liable. (Record, 33, folio 106.)

Sixteenth. The judge concluded his charge to the jury in these words: "If you believe the testimony on the part of the plaintiffs, and find that there was notice of dissatisfaction served, and believe also that these goods were flannels, then your verdict must be for the plaintiffs for the amount claimed, with interest;" to which the defendant below excepted and now assigns the same as error.

Seventeenth. At the conclusion of the charge, upon the facts indicated, the collector asked to have the jury told that neither the district attorney nor the court had the right to waive the requirements of the statute as to service of protest, notice of appeal, and time of bringing suit. This was not done, and then defendant having excepted, assigns it as error. (Record, 33, folio 105.)

Eighteenth. The collector also asked an instruction to the effect that if the jury believed the date of liquidation was in fact March 11, 1864, and that within ten days thereafter no protest or notice of dissatisfaction was served on the collector, then the defendant was entitled to a verdict. This was refused, exception taken, and it s now assigned as error. (Record, 33, folio 105.)

Brief.

I.

The errors first assigned relate to the standing in court of the original plaintiffs. If they are not found *recti in curiâ*, there will be no occasion to discuss the question they undertook to litigate.

1. As it was solemnly decided by this court, in Cary *v.* Curtis, 3 Howard, 236, the effect of the act of March 3, 1839, chap. 82, § 2, (5 Stats. at Large, 348,) requiring the

collector to pay into the Treasury all duties, whether paid under protest or not, was to bar *all* suits against collectors for the recovery of moneys paid to them as duties.

Subsequent statutes were necessary to restore the right of action. They did restore it, *sub modo*, to the extent their language (properly construed) imports, and no further.

The act on this subject, in force at the time of this importation, was the before-quoted act of March 3, 1857, chap. 98, § 5, providing that upon the entry of any goods the collector's determination as to the duty should be final, unless notice of dissatisfaction were given "within ten days after such entry." The language is plain; if so plain as to need and receive no construction, (and it would seem to be so,) there is an end of this case; for these goods were entered in December, 1863, and there is no pretense of any notice of dissatisfaction until "early in March," 1864. Goods are *imported* when voluntarily brought within the limits of a collection-district, with intent there to unlade them. (Mary, 1 Gall., 206; Boston, *id.*, 239; United States *v.* Arnold, *id.*, 358, affirmed, 9 Cranch, 104; United States *v.* Lindsay, 1 Gall., 365; Paine *v.* United States, 2 Gall., 208; United States *v.* Lyman, 1 Mason, 499; United States *v.* Vowell, 5 Cranch, 368; Meredith *v.* United States, 13 Pet., 494.) The entry is something done subsequently to the importation. Same cases, and Perots *v.* United States, 1 Peters' Cir. Ct. Reps., 257.

"ENTRY.—The depositing of a document in the proper office or place." Wharton's Law Lexicon, 349.

"ENTRY OF GOODS.—*Commercial law.*—An entry of goods at the custom-house is the submitting to the

officers appointed by law, who have the collection of customs, goods imported into the United States, together with a statement or description of such goods, and the original invoices of the same. The acts of March 2, 1799, § 36, and of March 1, 1823, regulate the manner of making entries of goods." Bouvier's Law Dict., 470.

That act of 1799, (1 Stats., 655–658,) as previously stated, provides that the owner or consignee of the goods imported, within fifteen days after the master reports the ship's arrival, "shall make entry thereof in writing with the said collector," specifying the particulars mentioned, being those found in the document printed on pages 14 and 15 of this Record.

It is further required that there shall be administered a certain oath at the time the entry is made. In the case at bar, that oath was taken December 26, 1863. (Record, 16, 17.) It is that provided by the act of March 1, 1823, chap. 21, § 4, 3 Stats., 730. The aforesaid act of 1857, chap. 98, § 5, expressly limited the notice of dissatisfaction upon this importation to ten days, after December 26, 1863, at the latest. To make the benefits of the act of 1857 more available to the importers, it was amended by the act of June 30, 1864, chap. 171, § 14, 13 Stats., 214, so as to require the notice of dissatisfaction to be given within ten days "after the ascertainment and liquidation of the duties by the proper officers of the customs;" showing a recognition of the fact that, under the previously existing law, it must be ten days after entry.

2. What would constitute a sufficient notice of dissatisfaction was question of law; whether the parol evidence of such notice showed it to contain these constituents was question of fact; but the judge in his charge

(as quoted in the first assignment of error) directed the jury imperatively to consider the question of the delivery of a notice in this case "somewhere about the 10th or 11th of March," without directions as to its sufficiency.

II.

1. If the word "entry" can be extended so as to mean the final liquidation of duties, the custom-house records must govern as to the true date of such liquidation. Any hearsay report, circulating among clerks, is no proof that duties have been liquidated, but the final action is really had and record made of it is decisive. The charge was, therefore, erroneous in stating that this was not necessarily matter of record. In private affairs a man keeps such accounts of his receipts and expenses as pleases him; but that the collector can do as he pleases about keeping account of the sums at which duties upon imports into New York are liquidated does not seem possible. If March 11, 1864, is fixed as the day of liquidation and the day of entry under the act, then notice "early in March," "ten days before the 15th," &c., would not be "within ten days *after* such entry," and would be premature and ineffectual. Instructing the jury that if the notice was delivered to the collector "somewhere about the 10th or 11th of March" (Record, 32, folio 100) that was sufficient, was an error, because the jury should have been distinctly told that the notice must be "*after* such entry."

2. The importers' notice was claimed to be, as the statute required, in writing. Notice to produce had been served and complied with. The importers professed to have delivered the collector another paper, relative to this importation, not produced by him; to

wit, a notice of dissatisfaction. Before parol proof of its contents was received, the district attorney claimed the right to cross-examine the witness to determine the identity of the paper of which he was about to state the purport, but this was not allowed. The original paper never was delivered to Mr. Barney, but to E. F. Mudgett, deputy collector, if to anybody, (Record, folio 71,) at the deputy's office, in the custom-house.

There is this, then, to be said. The notice never was served upon or delivered to Mr. Barney personally. There was no reason to expect to find it in his custody, or for notifying him to produce it. If a paper which he should produce, it should have been delivered to him that he might keep it for such future use. If an official document, it would, of course, be kept with the custom-house records, and be as accessible there to the plaintiffs, Watson & Co., as to Mr. Barney, (long years after he ceased to be collector,) and to be reached by a subpœna to the proper custodian there. It is only when the papers are shown or admitted to be in the possession of the opposite party that secondary evidence of their contents is receivable upon notice to produce. (Life Ins. Co. *v.* Mech. Ins. Co., 7 Wend., 34.)

Search for a paper must first have been made in a place where it is most likely to be found. "It must appear that the party, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would suggest and which were accessible to him." (1 Greenl. on Ev., § 558; 1 Starkie on Ev., (Metc. ed.,) 336; Glenn *v.* Rogers, 3 Md., 320–'1; Harper *v.* Scott, 12 Georgia, 125; Molyneaux *v.* Collier, 13 Georgia, 406; Sellers *v.* Carpenter, 33 Maine, 486–'7; Reg. *v.* Saffron Hill, 1 El. & B., 93; Reg. *v.* Denio, 7 B. &C., 620; Reg. *v.* Castleton,

6 T. R., 236; Williams *v.* Younghusband, 1 Starkie, 139; Walker *v.* Beauchamp, 6 C. & P., 552; Reg. *v.* Stourbridge, 8 B. & C., 96, and 2 M. & R., 43; Hart *v.* Hart, 1 Hare, 1; Evans *v.* Rees, 10 Ad. & El., 154.) If a loss of documents be alleged it must be proved by the person in whose hands they were at the time of loss, or to whose custody they were traced, if that person be living. (Murray *v.* Buchanan, 7 Blackf., 550–'1; Fletcher *v.* Jackson, 23 Vt., 581.) The existence of the paper as a genuine instrument must first be proved, and its loss. (Kelsey *v.* Hanner, 18 Conn., 311; Perry *v.* Roberts, 17 Misso., 36.) Here, there is absolutely no evidence that such a paper as the law requires ever existed. Mr. Townley swears, upon p. 22, that he signed it, but explains upon the next page that he thinks it was *probably* signed by him; but not even a surmise that it was signed by Wm. Watson & Co., or by either partner expressing the signature to be for the importing firm. To determine this preliminary question by cross-examination was the right the counsel for the plaintiff in error claimed to exercise. It being shown to be put in the hands of Mr. Mudgett, he should have been subpœnaed to produce it, unless it is to be considered part of the official record of the New York custom-house, in which case mere notice to produce was not enough to justify the reception of secondary evidence. (Kidd *v.* Cromwell, 17 Ala., 652.)

3. The contents of the paper are not stated sufficiently to show compliance with the requirements of the statute; nor was there any proof of its having been served after the duties were liquidated.

4. The date (or act) from which the ten days' limitation began to run, was a question the court should have settled.

III.

Unless the Government can be allowed to show *aliunde* that persons called as experts are not so, or are mistaken as to the character of the articles about which they testify, this method will frequently be used to deprive the United States of rightful revenue.

IV.

The collector's counsel should have been allowed to prove that this was a special importation, for two reasons: (1) to show that the article had no well-known commercial designation; and (2) to show that its purpose was that for which woolen goods were required.

V.

1. The act of the importers in adopting into their entry, given to the collector, the designation given these goods in the invoices, created an estoppel upon them, preventing them from subsequently claiming the articles to be different from what they had thereby represented them to be.

2. At any rate, in view of these facts, the court was not justified in telling the jury that the importers had always claimed them to be flannels, and that the evidence in the case so showed. These documents were to be construed by the court; and the statement of them thus given to the jury was not legally correct.

VI.

The jury might have believed all the plaintiffs' evidence and yet not have been satisfied that a *sufficient*

notice was *seasonably* served; the conclusion of the charge was therefore altogether too broad in its statement. This error, so far from being elsewhere corrected, was, in effect, committed in the earlier parts of the charge.

VII.

An attempt was made by the request presented to correct this sweeping assertion as to notice at the close of the charge; but the judge refused to tell the jury that, even if they found the liquidation to have been made March 11, 1864, the notice of dissatisfaction must have been subsequently served; thus confirming their impression that it was not material whether such notice was given before or after the liquidation.

EDWIN B. SMITH,
Assistant Attorney-General.

Supreme Court United States.

OCTOBER TERM, 1875.

HIRAM BARNEY, Collector of the Port of New York

Plaintiff in Error,

vs.

WM. WATSON and WM. G. TOWNLEY, trading as Wm. Watson & Co.,

Defendants in Error.

No. 207.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF OF DEFENDANTS IN ERROR.

J. HUBLEY ASHTON,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1875.

HIRAM BARNEY, COLLECTOR OF THE PORT OF NEW YORK, Plaintiff in Error,

vs.

WILLIAM WATSON AND WILLIAM G. TOWNLEY, TRADING AS WILLIAM WATSON & Co., Defendants in Error.

No. 207.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was a suit instituted by William Watson & Co. to recover back moneys alleged to have been erroneously and illegally exacted from them by Hiram Barney, Collector of the port of New York, and paid by plaintiffs under protest, as and for duties on certain goods imported by them into New York, in December, 1863.

The suit was originally commenced in the court of common pleas for the city and county of New York, on April 2, 1864, and was removed by *certiorari* into the circuit court of the United States for the southern district of New York, under the 3d section of the act of March 2, 1833, commonly called the "Force Act."

The jury found a verdict for the plaintiffs and assessed their damages at $2,235.72, and for that amount the court

entered judgment against the defendant, (Rec., p. 4, fol. 12;) whereupon he sued out this writ of error.

I. The bill of exceptions shows that the importation in question before the jury was of ten bales of woolen goods, which the plaintiffs claimed were commercially known in the market of this country by the name of flannels, and were subject, therefore, to the duty of 35 *per centum* ad valorem, imposed upon flannels by the 13th section of the tariff act of March 2, 1861, and the 9th section of the act of July 14, 1862, "increasing temporarily the duties on imports, and for other purposes." (12 Stats., 184; ibid., 553.)

The Collector contended that the goods in question were not within the designation of flannels, but fell under the classification of "manufactures of wool of every description, made wholly or in part of wool, not otherwise provided for, ... weighing less than twelve ounces per square yard," and that they were, therefore, legally subject to the duties imposed upon such manufactures by the acts of March 2, 1861, and July 14, 1862, namely, 35 *per cent.* ad valorem and 18 *cents per pound*, which was the duty assessed upon them at the custom-house and paid by the plaintiffs under protest.

Upon the well-known and well-settled doctrine of this court, that in imposing duties Congress must be understood as describing the articles upon which the duty is imposed, according to the commercial understanding of the terms used in the law, in our own markets, the question thus presented was one purely of fact, namely, whether or not the articles in question in this case were, in commercial understanding, known as flannels in the American market.

A glance only at the bill of exceptions is needed to show that the evidence on the part of the plaintiffs proved conclusively that the goods in question were distinctively known and denominated in the markets of this country as flannels, and that nothing to the contrary was shown on the part of the defendant.

The jury accordingly found, as the evidence required, that the article in question was as claimed by the plaintiffs, and

rendered a verdict in their favor for the 18 *cents per pound* paid by them, under protest, in excess of the duties imposed by law upon flannels.

II. There was but one other question that cut any figure in the case, and that also was *a pure question of fact*, which the jury correctly decided, under the evidence before them, in favor of the plaintiffs. The question was in regard to the service upon the collector of a proper written notice of dissatisfaction with his decision within ten days from the liquidation of the duties upon this flannel.

Judge Smalley, an experienced revenue judge, who presided at the trial, told the jury, as will be seen from the report of his charge, (Rec., p. 32,) that one of the questions upon which they were to pass was whether or not a notice of dissatisfaction was served by the plaintiffs within the time prescribed by the law governing that subject. The jury were satisfied from the testimony of Mr. Townley, one of the plaintiffs, and Mr. Warren, their Custom-house clerk, that such a notice was served upon the collector within that time, and they so found by their verdict. The Court said that the Custom-house was not bound to give the plaintiffs written notice of the liquidation of the entry, but that it was entitled to receive a notice of dissatisfaction within ten days from the liquidation. And the question was thus put: "Now, did they get that notice of dissatisfaction? That is the question for you to determine. There is no dispute about what the testimony is. One of the plaintiffs' clerks [Mr. Warren] testified that such a notice was given. It is claimed on the part of the Government that it was something else, and a notice of some other goods. Now, whether it was or was not, is the question for you to determine."

That this was a fair, proper, and unexceptionable charge under the law and the evidence, we shall submit, cannot be questioned.

The state of the case upon this branch of it was simply as follows:

The entry including the flannels in question, which appear to have been part of a larger importation consigned to Watson & Co., was made up on December 24, 1863, and sworn to and filed in the Custom-house on the 26th of December, 1863. (Rec., pp. 14-17.)

The duties upon the flannels were not finally ascertained and liquidated, however, by the Custom-house authorities until early in the following March, 1864, and by that adjustment and liquidation the plaintiffs were charged with duty at the increased rate of 35 per cent. ad valorem, and 18 cents per pound.

Now the 5th section of the Act of 1857 required an importer intending to appeal from the decision of the Collector in imposing duties to give him notice in writing of "his dissatisfaction with such *decision*, setting forth therein distinctly and specifically his grounds of objection *thereto*."

As it would have been manifestly impossible for these importers to have given the collector a written notice of their dissatisfaction with his decision until it was *made* by the liquidation of the duties at the rate fixed by him, it was not denied by the defense in this case that the ten days within which the importers were required to give the notice began to run from the time of the liquidation.

The question thus arose, and it was the only question between the parties at the trial below, upon this branch of the case, when were the duties at the increased rate in fact liquidated under the Collector's decision, and whether the plaintiffs gave the Collector such a notice of their dissatisfaction with his decision as the statute required, within ten days from the time of such liquidation?

The evidence on the part of the plaintiffs upon this subject consisted of the testimony of one of the partners Mr. Townley, and the testimony of Mr. Warren, the clerk who attended to their Custom-house business.

These gentlemen gave their testimony after the plaintiffs had proved the service of a call upon the defendant previous to the trial, to produce on the trial the notice of dissatisfac-

tion, and the defendant failed to produce that notice. (Rec., p. 21.)

The testimony of Mr. Warren and Mr. Townley is evidently imperfectly reported in the bill of exceptions, which, indeed, does not purport to contain the whole of the evidence. But it will be seen that Mr. Warren testified that he ascertained at the Custom-house, by seeing the figures on the entry indicating the settlement of the amount of the duties, that the duties were liquidated at the increased amount, and that a written notice of dissatisfaction was served within ten days from that time. (Rec., p. 25, fols. 74-75.)

His memory would not allow him to fix the very day on which the notice of dissatisfaction was served. But he fixed pretty closely the time when the entry was handed to him, according to custom, by the amendment clerk of the Custom-house for examination, and he saw on the entry the words and figures, "*Increase* 1,182.71," which indicated that the entry was liquidated and the amount demanded, and his testimony was to the effect that within ten days from the time he thus got notice of the settlement of the amount of duties by the Collector, Mr. Townley or he served the written notice of dissatisfaction. (See the Testimony of Mr. Warren, from page 23, fol. 69, to page 26.)

Mr. Townley testified that the purport of the paper was that the plaintiffs objected to the goods being liquidated as woolen goods, and subject to the higher duty; that they claimed they were flannels, and were subject to a duty of 35 per cent. ad valorem. (Rec., p. 22, fol. 64.)

The jury had this evidence before them, and the learned court correctly instructed them that it was their province and their duty to find from it whether or not the plaintiffs served a proper notice of dissatisfaction within ten days from the liquidation of the entry. The jury decided that issue for the plaintiffs. Their finding was satisfactory to the learned court, who heard the evidence and saw the witnesses. No motion for a new trial was made by the defendant. And the verdict,

under these circumstances, must be regarded as conclusive of the fact found by it.

The act of March 3, 1857, required, in order that the importer might have a right of action against the Collector, that in addition to serving a notice of dissatisfaction with the Collector's decision within ten days, he should appeal from that decision within thirty days to the Secretary of the Treasury, and bring his suit within thirty days after the date of the decision of the Secretary upon the appeal.

The record shows, and the fact was not disputed below, that Watson & Co. took an appeal from the Collector's decision in regard to this entry of flannels to the Secretary of the Treasury within the thirty days prescribed by the statute, and instituted this action within thirty days from the date of the Secretary's decision affirming the decision and liquidation of the Collector of the Port.

The appeal to the Secretary of the Treasury was dated the 15th of March, 1864. It is in the record, and the defense never denied it was taken in time.

The letter of the plaintiffs, in which they took the appeal, shows how it happened that the liquidation of the duties at the increased rate complained of was not finally made till early in March, 1864. (Rec., p. 18, fol. 52.)

The Secretary of the Treasury rendered his decision, affirming the liquidation at the custom-house, on the 21st of March, 1864. (Rec., p. 18, fol. 53.)

The plaintiffs paid the increased duty on the 24th of March, 1864, and at the same time delivered their protest in writing of that date, which set forth that they protested against the payment of 35 per cent. *ad valorem* and 18 cents per pound on the ten bales in question as manufactures of wool or wool and cotton, on the ground that they were entitled to entry as flannels, paying a duty of 35 per cent. *ad valorem*, and stating that they paid the duty to get possession of the goods, and claimed to have the difference refunded. (See the Protest, Rec., p. 18, fol. 50.)

On the 2d of April, 1864—that is to say, within thirty days from the date of the decision of the Secretary of the Treasury—this suit was instituted to recover the amount claimed in the protest. (Rec., p. 20, fol. 58.)

The jury thus had evidence before them proving, or tending to prove:

1st. That the plaintiffs gave the Collector notice in writing in conformity with the statute of their dissatisfaction with his decision within ten days from the time of the liquidation of the duties.

2d. That within thirty days from that time they took an appeal from the Collector's decision to the Secretary of the Treasury.

3d. That they filed a protest in writing signed by them, at the time of the payment of the duties, setting forth distinctly their grounds of objection to the payment thereof.

4th. That they brought suit to recover the excess of duties within thirty days from the date of the decision of the Secretary of the Treasury.

Argument for Defendants in Error.

The learned counsel for the plaintiff in error has informed us that he proposes to assign eighteen alleged errors upon the contents of this brief record, and he has kindly furnished us a copy of this assignment in advance of his Argument.

The following remarks will accordingly be directed to an examination of the propositions, as we understand them, contained in this assignment of errors.

First Assignment of Error.

This assignment is plainly faulty on account of duplicity. It is based upon two separate and distinct exceptions—the exception to the refusal of the court to direct the jury, on the motion of counsel for the defendant, after the evidence was all in, peremptorily to find a verdict for the defendant; and also the exception to that portion of the charge in which the jury were told that if they believed that the notice said to have

been given to the Government about the 10th or 11th of March was a notice of dissatisfaction in this case, it was sufficient.

Two separate exceptions ought not to be embraced in this manner within one specification of error. But we submit that neither of the exceptions was well taken, and that the court was right, both in refusing to instruct the jury peremptorily to bring in a verdict for the defendant, and in giving the instruction referred to in this specification of error.

I. *The refusal to instruct the jury to find for the defendant.*

1. The motion on the part of the defense called for a direction to the jury to find for the defendant, on the ground alleged that the "preliminaries required by statute" had not been complied with by the plaintiffs. (Rec., p. 32, fol. 99.)

The court was thus asked to take the case out of the hands of the jury, apparently upon the theory that there was no evidence whatever which even *tended* to prove that plaintiffs had fulfilled the requirement of the 5th section of the act of March 3, 1857, in regard to service of notice of dissatisfaction with the decision of the collector.

That this motion referred merely to the time of service of the *notice of dissatisfaction*, and that it was not denied that the plaintiffs had taken their appeal to the Secretary of the Treasury and brought this suit within the time prescribed by the statute, clearly appears from a previous motion for a similar direction made by counsel for defendant, after which plaintiffs introduced their evidence touching the service of the notice of dissatisfaction. (See the 1st Motion, Rec., p. 20, fol. 59.)

It plainly appears further from this first motion that it was not controverted, but conceded, by the counsel for the Collector in the court below, that the 5th section of the act of March 3, 1857, by its just construction, authorized a notice of dissatisfaction (called in the motion a protest) to be given within ten days from the *date of the ascertainment and liquidation of duties* in the case of this importation.

We understand, however, that the counsel for the Govern-

ment *now* and in *this* court proposes to raise for the first time the point never before suggested in *any* case in *any* court, under the act of 1857, that the statute required these importers to serve upon the collector a written notice of their dissatisfaction with his decision increasing the rate of duty upon this merchandise, within ten days from the filing of the formal paper entry in the Custom-house, viz: the 26th of December, 1863, or, in other words, nearly *three months before the collector made any decision on the subject.*

It is submitted that whatever may be the words of the 5th section of the act of 1857, no court will ever hold, that it required an importer to file a notice of dissatisfaction with a decision of a collector before the decision was made.

No statute can be so construed as to require a man to do what is impossible.

The record shows that though the formal entry of these flannels, stating the rate of duty which plaintiffs claimed they were liable to pay, was presented at the Custom-house on the 26th of December, 1863, the decision of the Collector fixing the rate of duty and the liquidation of the entry were not arrived at till early in March, 1864. The time was taken up by the necessary proceedings at the Custom-house in the examination of the entry, the appraisement and reappraisement of the goods, the reports of the appraisers, and the final liquidation of the entry at the rate fixed by the Collector. (See testimony of Northup, Rec., p. 30; also, Appeal to Secretary, Ib., p. 18.)

And to say that this short statute of limitations ran against these importers nearly three months before the decision of the collector was ever made upon the question of the rate of duty would be simply preposterous.

It is a simple and sufficient answer to such a proposition to suggest that until the duties were liquidated, and until plaintiffs had some notice or knowledge of the intention of the collector to increase the duties, it would have been impossible for them to give notice in writing of their "dissatisfaction with such decision."

It is also an answer to the proposition in *this* court that no

such question was raised in the *court below*, and that it was *there* assumed by the counsel for defendant that plaintiffs had a right to give the notice of dissatisfaction *at any time within ten days after the liquidation of the entry.*

2. But by the true, just, and legal construction of the 5th section of the act of 1857, the term "*entry*" there used, does not refer to the formal paper writing signed and sworn to by the importer, and presented at the Collector's office upon the arrival of the vessel, but refers to and includes the *proceeding* at the Custom-house for the purpose of ascertaining and liquidating the duties, which begins with the filing of the formal paper, termed the entry, and terminates with the actual liquidation of the amount of duties under the decision finally rendered by the collector. Until this liquidation is arrived at the proceeding on entry is not completed; or, in other words, the *entry* is not *made,* and the importer is not in a position, and, therefore, is not required, to give any *notice of dissatisfaction* with the "*decision*" of the Collector.

When the duties were liquidated in pursuance of the Collector's decision the entry was made and completed; and then, for the first time, the ten days, prescribed by the statute, within which notice of dissatisfaction was required to be given, could begin to run.

3. We shall assume, therefore, that the plaintiffs were in time if they gave a notice of dissatisfaction, such as the law prescribed, within ten days from the time the duties were liquidated at the increased rate; and the question submitted to the Court below, by the defendant's motion for a peremptory direction to the jury to find for defendant, was, whether or not there was any evidence whatever in the case which proved, or *tended* to prove, that the plaintiffs gave such a notice within that period?

(*a*) The rule is well settled, that if there is any evidence, whether weak or strong, which *tends* to prove the issue, it *must* be submitted to the jury for their consideration and judgment.

Hickman *v.* Jones, 9 Wall., 197.

Chicago and N. W. R. R. *v.* Whitton, 13 Wall., 270.

(*b*) Now, the testimony of Mr. Warren and Mr. Townley was sufficient to prove not only that the plaintiffs gave a written notice of dissatisfaction with the decision of the Collector, stating distinctly their grounds of objection thereto, but also that the notice was given within ten days from the time the duties were liquidated at the increased amount. (Testimony of Mr. Warren, Rec., pp. 23, 26; Testimony of Mr. Townley, ib., pp. 21, 23.)

It would serve no useful purpose to copy the whole of that testimony here. It has been referred to in the *Statement of the Case*. The Court will look over it, and the merest glance will be sufficient to show that the Court below would have been guilty of gross usurpation if it had taken the case from the jury upon the issue as to the notice of dissatisfaction.

Mr. Warren, the plaintiffs' Custom-house clerk, testified distinctly that he learned at the Custom-house that the duties had been liquidated, at the increased rate, early in March—he thought it was a day or two previous to the 6th or 7th of March, 1864—and that the notice of dissatisfaction was served within ten days of that time. Although the entry was not then formally *indorsed* as liquidated, it was in fact *liquidated;* and this he knew by seeing at the time mentioned upon the entry the words and figures in red ink, "*Amended duty*, $10,023.64; *original duty*, $8,840.93; *increase*, $1,182.71," which he testified were written by the amendment clerk. (Rec., p. 19, fol. 57; also p. 25, fol. 74.)

It was customary, he stated at that time, for the clerks to hand them their entries for examination. (Rec., p. 25, fol. 75.)

Mr. Warren thought that he and Mr. Townley were together when the notice of dissatisfaction was delivered to the Deputy Collector at the Custom-house. (Rec., p. 24, fols. 70, 71.)

The indorsement, by a hand-stamp, on the back of the entry, "liquidated and notified importer, March 11, 1864," does not prove that the liquidation was made on the 11th of March.

There was no law providing for such an indorsement,

or requiring an official notice to be given the importer of the Collector's decision. At best it was a mere memorandum, made on the 11th of March, of a fact which had occurred before that date, as Mr. Warren's testimony proves.

It will not be pretended, we suppose, that if the notice of dissatisfaction was served *before* the 11th of March, it was not in time.

It was settled, while the act of 1857 was in force, that a prospective notice of dissatisfaction, covering all future similar importations, was a valid and sufficient compliance with that statute. (Hutton *v.* Schell, 6 Blatchf., C. C. R., 48; Wetter *v.* Schell, 11 Ib., 193.)

These decisions were approved by Judge Nelson, on the circuit, as founded on the decision of this Court in *Marriott* v. *Brune*, (9 How., 619,) as to prospective protests.

A fortiori, a notice of dissatisfaction, given in a particular case before the final liquidation of the entry, would have been good under the act of 1857.

The contents of the notice given in this case, as testified to by Mr. Warren, were proved by Mr. Townley, and they expressed distinctly and specifically the grounds of plaintiff's objections to the decision of the Collector. (See Mr. Townley's testimony, Rec., p. 22, fol. 64.)

In the light of this evidence, it was the function of the jury, and not the Court, to decide whether a notice of dissatisfaction had been given in this case, under the provision of the act of 1857; and defendant's motion was, therefore, properly overruled.

II. *Exception to the instruction given by the court.*

The second question under the first assignment of error relates to the portion of the charge of the Court recited in defendant's *second* exception to the charge, (Rec., p. 33, fol. 103,) as follows:

"Defendant's counsel also excepted to that portion of the charge wherein the Court said, if the jury believed that the notice said to have been given to the Government about the

10th or 11th of March was a notice of dissatisfaction in this case, it was sufficient."

The Court told the jury that plaintiffs must show to their satisfaction that they gave a notice of dissatisfaction in the case of these goods within ten days from the liquidation. The question then was as to *sufficiency* of the notice, if the jury should find that it was given within the time. That depended upon its contents. The contents were proved, after the Collector failed to produce the notice on call, by Mr. Townley. He testified to the contents as follows: "The purport of that paper was that we objected to the goods being liquidated as woolen goods, and subject to the higher duty; that we claimed they were flannels, and were subject to a duty of 35 per cent. *ad valorem.*" (Rec., p. 22, fol. 64.)

Manifestly, if such were the contents of the notice given with reference to the decision in the case of these goods, the notice was sufficient under the act of 1857. The paper stated distinctly and specifically the grounds of plaintiff's objection to the action of the Collector.

There was no objection made at the trial, [illegible] have been made with any propriety, to the pro[illegible] tents of the notice by secondary evidence, the [illegible] not being produced on call. (Butler v. [illegible]

The Supreme Court of Judicature in Englan[illegible] within a few days that secondary evidence was admissible to prove the contents of the lost will of the late Lord St. Leonards. (London Times, March 14, 1876.)

Second Assignment of Error.

There are two errors assigned in the second specification of the Assistant Attorney General.

I. The first error assigned seems to be founded on the objection taken at the trial to Mr. Townley stating the time when he heard at the Custom-house that the entry was liquidated. The court said: "It is not admissible to prove the fact, but he can refer to that for the purpose of fixing the date in his mind." (Rec., p. 21, fol. 62.)

or requiring an official notice to be given the importer of the Collector's decision. At best it was a mere memorandum, made on the 11th of March, of a fact which had occurred before that date, as Mr. Warren's testimony proves.

It will not be pretended, we suppose, that if the notice of dissatisfaction was served *before* the 11th of March, it was not in time.

It was settled, while the act of 1857 was in force, that a prospective notice of dissatisfaction, covering all future similar importations, was a valid and sufficient compliance with that statute. (Hutton *v.* Schell, 6 Blatchf., C. C. R., 48; Wetter *v.* Schell, 11 Ib., 193.)

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A fortiori, a notice of dissatisfaction, given in a particular case before the final liquidation of the entry, would have been good under the act of 1857.

The contents of the notice given in this case, as testified to by Mr. Warren, were proved by Mr. Townley, and they expressed distinctly and specifically the grounds of plaintiff's objections to the decision of the Collector. (See Mr. Townley's testimony, Rec., p. 22, fol. 64.)

In the light of this evidence, it was the function of the jury, and not the Court, to decide whether a notice of dissatisfaction had been given in this case, under the provision of the act of 1857; and defendant's motion was, therefore, properly overruled.

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Manifestly, if such were the contents of the notice given with reference to the decision in the case of these goods, the notice was sufficient under the act of 1857. The paper stated distinctly and specifically the grounds of plaintiff's objection to the action of the Collector.

There was no objection made at the trial, as none could have been made with any propriety, to the proof of the contents of the notice by secondary evidence, the original notice not being produced on call. (*Butler v. Mapes, 9 Wall. 778*)

The Supreme Court of Judicature in England have decided within a few days that secondary evidence was admissible to prove the contents of the lost will of the late Lord St. Leonards. (London Times, March 14, 1876.)

Second Assignment of Error.

There are two errors assigned in the second specification of the Assistant Attorney General.

I. The first error assigned seems to be founded on the objection taken at the trial to Mr. Townley stating the time when he heard at the Custom-house that the entry was liquidated. The court said: "It is not admissible to prove the fact, but he can refer to that for the purpose of fixing the date in his mind." (Rec., p. 21, fol. 62.)

We suppose the Court meant that while the fact that the witness *heard*, on a particular day, at the Custom-house, that the entry was liquidated would not tend to prove that it *was* liquidated, the time when he so heard might serve to enable him to fix the date of what he subsequently did, or of what subsequently occurred. The question was as to the *time* when the notice of dissatisfaction was served. Now, the witness might not be able to recollect the date of its service independently of the time when he heard that the liquidation had been made, and yet by reference to that time he might be able perfectly well to fix, approximately or otherwise, the date when the notice was served.

But we submit further that it was competent generally for the witness to state when he heard at the Custom-house that the entry was liquidated. The importer, as this Court has held, is bound to take notice of the time of the settlement and liquidation of the duties by the Collector. No statute requires a notice to be given him of the Collector's decision. And how else shall an importer put himself in the way of learning what the Collector has decided, and when the entry is liquidated, without inquiry at the Custom-house? He goes to the Custom-house and inquires whether the entry is liquidated. If the answer is yes, he asks to see the liquidation, and if he finds it has been made, it is his duty to serve a notice of dissatisfaction within ten days, in case he proposes to appeal. But suppose he ascertains, as the result of his inquiry, that no liquidation has been made. Clearly that fact might be important, in many supposable cases, as a means of determining the time of any subsequent liquidation, and from which the time for an appeal began to run.

II. The *second* error assigned in this second specification relates to the overruling of the objection of counsel of defendant to the examination of Mr. Townley by the plaintiffs in regard to the *contents* of the notice of dissatisfaction, before he was cross-examined on the part of the defendant as to the identity of the paper. (Rec. p. 22, fol. 64.) Whether the ...ness should be examined in chief on the *whole* matter to

which he was called to testify before he was cross-examined on the point stated by counsel for defendant, or whether the Court would permit the defendant to cross-examine him as to the identity of the paper not produced by the defendant on call, before he should be allowed to give the contents of the document, was simply a matter resting in the sound *discretion* of the judge who presided at the trial.

This Court will not revise his action in the exercise of that discretion. The question related to the order of evidence and the examination of a witness. The defendant had full opportunity after the witness was turned over to him to cross-examine the witness as to the identity of the paper referred to, and he did so at great length, as the record shows. Defendant, therefore, could have sustained no injury or prejudice by the course which the Court thought proper to adopt as to the examination of this witness.

No rule is better settled than this, that even where *error* occurs in a ruling below, to warrant a reversal it must affirmatively appear to have worked injury to the party complaining. (R. R. Co. *v.* Smith, 21 Wall., 261; Brobst *v.* Brobst, 10 Wall., 519; Ib., 263.)

Third Assignment of Error.

It is difficult to see upon what exception at the trial this assignment is predicated. The assignment recites the testimony of Warren as to seeing the liquidation on the entry in the early part of March, and ends with a reference to the motion for a verdict for defendant, which has been already discussed. The idea seems to be suggested, however, in the specification, that the indorsement on the entry dated March 11, 1864, had something of the sanctity and verity of a *record*, and could not be varied by other evidence. But we have already said that this indorsement proved nothing at all in regard to the liquidation. It was not made under any statute or any regulation of the Treasury Department.

It was not until 1869 that Collectors were required by the Regulations of the Department to keep any record at all of the entries liquidated. And those Regulations required no indorse-

ment of the fact or time of liquidation to be made upon the entry. The Regulations in force at this time were those of 1857, which did not provide for any record whatever of the entries liquidated, or for any notice to importers of liquidations of duties.

Importers were obliged, as this Court has held, to take notice of the decision of the Collector, and to file their protest or notice of dissatisfaction within the time prescribed by law. (Westray *v.* U. S., 18 Wall., 328.) As it was incumbent on the plaintiffs to ascertain at the Custom-house when the entry was liquidated, they had the right, of course, to establish on this trial the *time* of liquidation by the best evidence in their possession. The liquidation consists merely of a calculation of the amount of duties claimed by the Collector under his decision as to the character and classification of the goods; and when the amount is ascertained, the liquidation is made. Mr. Warren proved when the figures showing the amount of duty claimed in this case by the defendant were upon the entry, and he gave the notice within ten days from that time. If it was not competent for the plaintiffs to prove these facts, it was not competent for them to prove anything.

Fourth Assignment of Error.

The counsel for plaintiff in error has copied, in this assignment, the whole of the charge of the Court in regard to the notice of dissatisfaction, and concludes the specification thus: "the original defendant excepted to these instructions, and *now assigns them for error.*"

The correctness of the charge cannot be considered upon such a general assignment, under the 21st rule of this Court. (Lucas *v.* Brooks, 18 Wall., 456.)

Fifth Assignment of Error.

This relates to so much of the charge recited in the next preceding assignment of error as refers "*to the liquidation of duties upon the importations in question.*"

We suppose counsel refers to the passage in the charge which stated that "*a final liquidation is not necessarily a matter of record. It is a mere record, such as would be made by business men to refresh their recollection.*"

This statement of what is meant by a final liquidation, in the practice of the Custom-house, under the law and the Regulations of the Treasury Department, is strictly correct.

We have already said that there was, at the time of this entry, no requirement of statute or regulation that any *record* should be kept in the Custom-house of liquidations of duties under the rulings of the Collector.

The liquidations were not required to be extended in figures upon the entries, or upon any book kept at the Custom-house; nor was any minute or memorandum of the *fact* or *time* of liquidation, in the case of any importation, required to be made upon the entry filed by the importer, or upon any other document.

In practice, however, we believe, the figures showing the amount of duty imposed are usually or often extended upon the entry; but such an extension in figures of the duties claimed, when it occurs, is a mere memorandum, as Judge Smalley states, "such as would be made by men of business to refresh their recollection."

By the Regulations of 1869 (not in force when this entry was made) the Collector was required to keep a daily record of the entries liquidated, and to post a transcript of such record in his office, on the day succeeding the date of the ascertainment and liquidation. But this record was not required to contain the *liquidations*, or copies of the liquidations. The importers were still obliged to refer to the actual liquidations for information as to the amounts of duties claimed by the Collector upon their importations.

Sixth Assignment of Error.

This is based on "the instructions relative to the notice of dissatisfaction which are quoted in the fourth assignment of error." The portion of the charge we suppose here referred

to is that recited in the *second* exception to the charge,) Rec., p. 33, fol. 103,) which we have already considered under the head of the *first assignment of error*.

There was an effort made on the trial by the defendant to create a doubt as to the identity of the notice to which Mr. Townley testified, by producing a protest, dated the 10th of March, 1864, in the case of *another* entry by this firm. (See Record, p. 31, fol. 97.)

And the Court said to the jury that, if they believed that what Mr. Townley and Mr. Warren testified to was a notice or protest in regard to some other liquidation in a case of another importation, it would, of course, not avail the plaintiffs in this case.

Seventh Assignment of Error.

This assignment is founded apparently upon the admission of the testimony of Mr. Warren as to the time when the entry was liquidated.

We have considered the competency of that evidence above, and it is not necessary to repeat what has been said.

But it is to be observed that the record shows an objection taken to but *one* question asked that witness by plaintiffs, and fails to show the ground of objection to that question. (Rec., p. 25, fol. 73.)

An exception to the admission of testimony must show the ground of objection.

Eighth Assignment of Error.

No objection whatever was interposed at the trial to the introduction of evidence on the part of the plaintiffs to prove the service of a notice of dissatisfaction upon the Collector within the time prescribed by the act of 1857.

That is a sufficient answer to this assignment.

Ninth Assignment of Error.

We scarcely understand the proposition stated in this assignment.

How any testimony by Mr. Charles G. Harmer, a dealer in saddlery goods, as to the commercial name of goods like *Exhibit I*, (whatever those goods might have been, for the record don't show what they were,) tended to show that plaintiffs' witnesses were not "experts in the particular class of goods they pretend to be experts in," it is impossible to discover by ordinary intelligence.

The expert character of plaintiffs' witnesses was to be tested in quite another way.

Tenth Assignment of Error.

The defendant asked Mr. Watson, on cross-examination, to ascertain from his books whether he sold these goods to be made into army shirts.

The court decided that this was immaterial, as of course it was, and refused to admit the evidence. (Rec., p. 28, fol. 85.) No argument is needed to show that such evidence was wholly irrelevant and inadmissible on an issue as to the commercial name of the article.

Eleventh Assignment of Error.

This assignment is not based upon any objection or exception taken at the trial, and cannot, therefore, be considered.

The complaint here made, as we understand, is that the Court did not rule out all secondary evidence of the contents of the notice of dissatisfaction testified to by Mr. Warren and Mr. Townley.

The admissibility of such evidence does not appear to have been denied at the trial.

Twelfth Assignment of Error.

Clearly this assignment is not well-framed, or well-founded. It seems to be composed of two alleged errors: *first*, that the Court left it to the jury to determine the date from which the time begins to run within which a protest must be filed; *second*, that it did not instruct the jury that the ten days'

limitation began to run upon the 24th or 26th of December, 1863, whichever was found to be the date of entry.

Now, as to the *first* error alleged, we say that if it is meant to affirm that the Court left the jury to determine as matter of law when the time began to run in this case, under the act of 1857, the statement is incorrect. The Court did not do that. The Court left the jury to decide, whether a notice of dissatisfaction was served within ten days from the liquidation of the entry; and, of course, the time of the liquidation of the entry was a question of fact for the jury under the evidence.

As to the *second* error alleged, viz: that the Court ought to have ruled that the ten days' limitation began to run *on the 24th or 26th of December*, 1863, we have already answered the suggestion in two ways: 1*st*, no such proposition was advanced in the Court below; 2*d*. it would not be respectful to Congress to affirm that it intended to require a man to object to, or appeal from, a decision or act of a Collector before the decision was made or the act was done.

Thirteenth Assignment of Error.

The complaint here appears to be that the Court did not decide for the jury that the date of the liquidation was the 11th of March, and tell them that was the date from which the ten days for the notice began to run.

It was manifestly proper for the Court to leave the question of the date of the liquidation to the jury, as a question of fact upon the evidence in the case.

Fourteenth Assignment of Error.

The objection here taken to a sentence in the charge of the Court cannot be made upon writ of error in this Court.

This Court will not examine the bill of exceptions with a microscope to see whether there was any evidence on the part of the defendant as to the matter of fact referred to by the judge below, and to convict him of error.

It is clear that what the Court did say was, that it had

failed to perceive any evidence showing that the goods were *not* flannels. But it left the question fully and fairly with the jury, and told them to consider the evidence, if they found any.

Fifteenth Assignment of Error.

The counsel will not, we are sure, ask the Court to consider the erroneous proposition in this assignment.

The question in a suit to recover duties paid under protest is solely and exclusively a question as to the commercial name of the article in the *American* markets.

200 Chests of Tea, 9 Wh., 438.
Elliott *v.* Swartwout, 10 Pet., 152.
Curtis *v.* Martin, 3 H., 106.
Lawrence *v.* Allen, 7 H., 797.

Sixteenth Assignment of Error.

The last sentence in the charge is here assigned as error.

It is unnecessary to say that this Court will look at the entire charge, in order to see whether, on the whole, the law was fairly presented to the jury, and will not engage in the work of picking to pieces separate sentences in it. We have shown that the charge was correct on the only two questions in the case.

Seventeenth Assignment of Error.

The Court rightly declined to oblige the counsel for defendant by stating to the jury a fact which, though true, had nothing to do with the case in any proper view of it.

It was not respectful to the Court for the counsel to propose such an instruction.

When the charge is sufficient to present the whole controversy to the jury, it is no cause for reversal that one or more prayers presented by the losing party, and not given, were correct in the abstract. (Schools *v.* Risley, 10 Wall., 91; Taber *v.* Cooper, 7 Wall., 571.)

Eighteenth Assignment of Error.

The Court simply declined to change its charge upon the general question as to the service of a notice of dissatisfaction, which left it to the jury to find whether or not such a notice was given to the Collector within ten days from the date of the liquidation of the entry.

The general charge in effect affirmed the point in the requested instruction which is referred to in this assignment. The jury were instructed in the general charge that the notice was required to be given within ten days from the liquidation; and that if no notice was given within that time the plaintiffs could not recover.

It was wholly unnecessary for the Court to apply its general instruction to any particular date.

Further, the evidence showed that, in point of fact, the entry had been liquidated before the 11th of March, 1864; and the jury were not entitled to believe that the date of the liquidation was in fact on the 11th of March.

The rule is settled that Courts of the United States are not bound to give instructions upon specific requests by counsel for them. If the Court charge the jury rightly upon the case generally it has done all that it ought to. It is not bound to answer "a catechism of questions." (Mills *v.* Smith, 8 Wall., 27.]

We have gone through the eighteen assignments of error as best we could without the brief of counsel for plaintiff in error; and as they are all without merit, we ask that the judgment be affirmed with costs.

J. Hubley Ashton,
Of Counsel for Defendants in Error.

1. Elliott v Swartwout 10 Peters 137.

2. Act of Mch 3d 1839 Dunlop 965 Sec 2

3. Cary v Curtis 3 Howard 236

Act Feb 26-1845 Dunlop 1062.

Maxwell v Grisnola 10 Howard 242

Laurence v Caswell 13 Do 488 496

11 Stats 195 ~~13 Do~~

Act June 30-1864 15 Stats 214 Sec 14